Supreme Court of the United States

OCTOBER TERM, 1964

No. 232

UNITED STATES, APPELLANT,

vs.

BOSTON AND MAINE RAILROAD, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

INDEX

[fol. a]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL DOCKET 63-252-S

THE UNITED STATES

vs.

BOSTON & MAINE RAILROAD;
PATRICK B. McGINNIS;
GEORGE A. GLACY;
DANIEL A. BENSON;
INTERNATIONAL RAILWAY EQUIPMENT CORP.;
and
HENRY MERSEY;

Attorneys

For U. S.:

US Atty. Stephen Moulton
US Atty. Murray Falk

For Defendant:

Lawrence R. Cohen
31 Milk St., Boston Cap. 4500
for deft. Patrick McGinnis

ANTI-TRUST
Vio. 15 U.S.C. 20
18 U.S.C. 660

Edward B. Hanify (B&M RR)
50 Federal St.
Boston, Mass.

Lawrence R. Cohen (McGinnis)
209 Washington St.
Boston, Mass.

Edward O. Proctor (Glacy)
294 Washington St.
Boston, Mass.

Claude B. Cross (Benson)
73 Tremont St.
Boston, Mass.

Jackson J. Holtz (Mersey: Inter. Rail. Equip. Corp.)
19 Milk St.
Boston, Mass.

DOCKET ENTRIES.

1963

Aug. 13—Indictment returned to Court by Grand Jury. Order for impounding documents entered.
14—Appear. of Atty. Lawrence R. Cohen for Deft Patrick McGinnis—filed.
14—Appear. of Atty. William T. Griffin for Deft Patrick McGinnis—filed (44 Wall St., N.Y.C.).
20—Appear. of Atty. Jackson Holtz and Cornelius J. Sullivan—filed —Mersey & Internatl.
Appear of Atty. Edw. Hanify and Noel Holland for B&MRR—filed.
Appear. of Atty. Claude B. Cross and John M. Reed for Deft Benson—filed.
Appear. of Atty. Chas. W. Bartlett and Edward O. Proctor for deft Glacy—filed. (Withdrawn)/
29—Appear. of Atty. George C. Caner—filed (for B&MRR).

[fol. b] Aug. 20—SWEENEY, CH.J. defts. arraigned.
Boston & Maine—Atty. Edw. Hanify enters plea of not guilty in behalf of Corp. Court allows Atty. Hanify until Mon. Aug. 26 at 12 noon to file power of atty.
Patrick B. McGinnis—enters plea of not guilty —bail 1000 without surety.
George F. Glacy—enters plea of not guilty—bail 1000 without surety
George F. Glacy—enters plea of not guilty—bail 1000 without surety.
Daniel A. Benson—enters plea of not guilty—bail 1000 without surety.
Henry Mersey—enters plea of not guilty—bail 1000 without surety.

1963

Aug. 20—International Railway Equipment Corp.—POWER OF ATTY. filed—Henry Mersey, Pres. of Corp. enters plea of not guilty in behalf of corp.

Court permits all defts. to travel according to business requirements.

All defts. allowed to file special pleas by September 16, 1963.

26—Atty. Edward Hanify filed Power of Atty., as ordered by Court, at 9:51 AM.

29—Boston & Maine motion for Bill of Particulars—filed.

Sept. 13—Motion of deft. Boston and Maine Rd. to dismiss the indictment filed.

16—Withdrawal of appearance of Charles W. Bartlett for deft. *George A. Glacy* filed.

16—Motion of deft. Patrick B. McGinnis to dismiss indictment filed.

16—Motion of deft. Patrick B. McGinnis for bill of particulars filed.

16—Motion of deft. Patrick B. McGinnis to strike parts of indictment (F.R. CR.P.Rule 7D) filed.

16—Motion of deft. Patrick B. McGinnis for a separate trial filed.

16—Motion of deft. Patrick B. McGinnis to raise defense under Rule 12(b) (1) filed.

16—Motion by deft. Daniel A. Benson to dismiss indictment filed.

16—Motion by deft. Daniel A. Benson for bill of particulars filed.

16—Motion by deft. Daniel A. Benson for severance of trial filed.

16—Motion by deft. Daniel A. Benson to strike Parts of the indictment filed.

16—Motion by deft. Daniel A. Benson to raise defense under Rule 12(b) (1) filed.

16—Motion of deft. George F. Glacy to dismiss indictment filed.

1963

Sept. 16—Motion of deft. George F. Glacy to strike immaterial and prejudicial matter from the indictment filed.

16—Motion of defts. George F. Glacy for a bill of particulars filed.

16—Motion of deft. George F. Glacy for a separate trial filed.

16—Motion of deft. George F. Glacy to raise defense under Rule 12(b)(1) filed.

16—Motion of defts. International Railway Equipment Corp'n. and Henry Mersey for bill of particulars filed.

16—Motion of defts. International Railway Equipment Corp'n and Henry Mersey to strike certain portions of the indictment filed.

16—Motion of defts. International Railway Equipment Corp'n and Henry Mersey to inspect and copy documents (Rule 16) and for production of documentary evidence prior to trial (Rule 17c) filed.

16—Motion of defts. International Railway Equipment Corporation and Henry Mersey for severance filed.

16—Motion of defts. International Railway equipment Corp'n. and Henry Mersey to dismiss Count II filed.

Oct. 4—Joint Memorandum of Defts Other the Boston and Maine RR in support of Motion for Severance filed.

SWEENEY, CH. J.

8—Memorandum—entered—All of the motions to dismiss the indictment and for severance and separate trials are denied.

The Motion of the defendants International Railway Equipment Corporation and Henry Mersey to inspect and copy documents was withdrawn in open court.

1963

[fol. c] Oct. 8—The Motion of the defendant Boston & Maine Railroad for a Bill of Particulars is allowed in full:

The Motion of the defendant George F. Glacy for a Bill of Particulars is allowed as to Paragraph 4 of the indictment. It is denied as to Paragraphs 5 and 11.

The Motion of the defendant Daniel A. Benson for a Bill of Particulars is allowed as to items numbered 1, 2, 3, and denied as to all others.

The Motion of the defendants International Railway Equipment Corporation and Henry Mersey for a Bill of Particulars is denied in full.

All of the Motions to Strike are denied. Any matters complained of because of their possible inflammatory effect on the jurors need not be drawn to the attention of the jury as it is not customary to read indictments to the jury, and they would be read only upon the insistence of the defendants." Copies to B&M; Glacy; Benson; Railway Equip. Corp.; Mersey; International Railway Equip. Corp.

Oct. 25—Stenographic record of the proceedings on August 20, 1963 filed.

Nov. 7—Bill of particulars of the Pltff. filed. c/s

4—Stenographic Record of the proceedings on October 7, 1963 filed.

14—Motion of Deft. George F. Glacy to dismiss Count 1 of the Indictment filed. c/s

15—Motion of Deft. Patrick B. McGinnis for reconsideration of his Motion to dismiss counts one and two of the Indictment. filed. c/s

15—Motion of Deft. Daniel A. Benson to dismiss Count 1 of the Indictment as defined by the Bill of Particulars, filed. c/s

19—Motion of deft. Boston and Maine Railroad for Judgment of acquittal or, alternatively, to dismiss. filed. c/s

1963

Nov. 19—SWEENEY, CH. J. SUPPLEMENTAL MEMORANDUM entered. . . Re: Deft. Patrick B. McGinnis for a Bill of Particulars m m motion of the Deft. is allowed as to paragraph 1 of the motion with reference to subparagraphs (b), (c), (e) and (f); the balance of the motion is denied. When all the particulars ordered have been furnished, the court will hear defendants' motions to raise a defense under Rule 12(b)(1). Copy to Lawrence R. Cohen, Esq. U.S. Asst. Atty. Moulton and Falk.

26—Brief in support of motion of Deft. George F. Glacy to dismiss count 1 of the indictment filed.

29—Motion of Defts. International Railway Equipment Corp. and Henry Mersey for reconsideration of their motion for a bill of particulars filed. c/s

29—Motion of Defts. International Railway Equipment Corp. and Henry Mersey, for reconsideration of their motion to dismiss Count II filed. c/s

29—Motion of Defts. International Railway Equipment Corp. and Henry Mersey, for reconsideration of their motion for severance filed. c/s

Dec. 2—Government's memorandum in opposition to Defts. motions to dismiss filed.

[fol. d] Dec. 3—SWEENEY, CH. J. Deft. George F. Glacy motion to dismiss Count 1 of the Indictment.

DISMISSED as per Memorandum, entered.

3—SWEENEY, CH. J. Deft. Patrick B. McGinnis motion for reconsideration of his motion to dismiss Counts one and two of the indictment ALLOWED as to Count 1—See Memo.

DENIED as to Count II. entered.

3—SWEENEY, CH. J. Deft. Boston and Maine Railroad's motion for Judgment of Acquittal or, alternatively, to dismiss DENIED as to "Acquittal", ALLOWED as to "Dismissal". See Memo. (Count 1 only).

1963

Dec. 3—SWEENEY, CH. J. Defts. International Railway Equip. Corp. and Henry Mersey motion for reconsideration of their motion to dismiss Count II DENIED. entered.

3—SWEENEY, CH. J. Defts. International Railway Equip. Corp. and Henry Mersey motion for reconsideration of their motion for severance DENIED TOTALLY. entered.

3—SWEENEY, CH. J. Defts. International Railway Equip. Corp. and Henry Mersey for reconsideration of their motion for a Bill of Particulars DENIED. entered.

3—SWEENEY, CH. J. Deft. Daniel A. Benson motion to dismiss Count 1 of the Indictment as defined by the Bill of Particulars DISMISSED as per Memorandum.

3—SWEENEY, CH. J. MEMORANDUM filed. Copies to Edward O. Proctor; Claude B. Cross; Lawrence R. Cohen; George C. Caner; Edward Myers.

1964

Jan. 2—Pltf's Notice of Appeal filed. c/s (To the Supreme Court)

Feb. 4—Stenographix record of Hearing on Dec. 3, 1963, filed.

[fol. e]

[Clerk's Certificate to foregoing paper omitted in printing]

[fol. 1]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INDICTMENT
CRIMINAL No. 15 U.S.C. 20, 18 U.S.C. 2, 660

UNITED STATES OF AMERICA

v.

BOSTON AND MAINE RAILROAD; PATRICK B. MCGINNIS; GEORGE F. GLACY; DANIEL A. BENSON; INTERNATIONAL RAILWAY EQUIPMENT CORPORATION; AND HENRY MERSEY, DEFENDANTS

INDICTMENT—filed August 13, 1963

The grand jury charges:

COUNT ONE

I. DEFENDANTS

1. The Boston and Maine Railroad (hereinafter referred to as "B&M"), a corporation organized and existing under the laws of the Commonwealth of Massachusetts and the States of Maine, New Hampshire, and New York, with its principal place of business at 150 Causeway Street, Boston, Massachusetts, is hereby indicted and made a defendant herein. B&M is a common carrier by railroad engaging in the transportation of passengers and property, in and between the States of Maine, New Hampshire, Vermont, Massachusetts and New York.

2. The individuals named below are hereby indicted and made defendants herein. Within the period of time covered by this indictment each of the said defendants held the position with defendant B&M indicated below:

Name of Individual Defendant	Address	Position held with Defendant B&M
Patrick B. McGinnis	Staten Island, New York, New York	President and Director
George F. Glacy	Brookline, Massachusetts	Vice President
Daniel A. Benson	Weston, Massachusetts	Vice President

[fol. 2]

II. NATURE OF TRADE AND COMMERCE

3. B&M is a rail common carrier which transports passengers and freight in and between the States of Maine, Massachusetts, New Hampshire, Vermont and New York. It connects with and interchange freight with other rail carriers and with water carriers and/or motor carriers operating in and between the aforesaid states and other states and foreign nations. B&M operates approximately 30 percent of the class I rail mileage among New England railroads. In 1958 and in each subsequent year B&M carried passengers in excess of 2,000,000 passenger miles and in excess of 15,000,000 tons of freight. In the same period it has had annual operating revenues of $60,000,000 or more, but has suffered a decline in revenues and has incurred a net loss near or in excess of $3,000,000 annually in each year of said period.

III. OFFENSE CHARGED

4. On August 14, 1958, defendant B&M violated Section 10 of the Clayton Act, 15 U.S.C. 20, by having dealings in certain articles of commerce amounting to more than $50,000 with another corporation when the said defendant B&M had upon its board of directors and as its president a person, and had as its selling officer and as its agent in the particular transaction a person, who at the same time had a substantial interest in such other corporation, which dealings were not with a bidder whose bid was the most favorable to the said defendant B&M, in that no competitive bidding under regulations prescribed by the Interstate Commerce Commission was conducted with

respect to said dealings. The aforesaid dealings consisted of the sale to International Railway Equipment Corporation of eight (8) stainless steel passenger coaches and two (2) stainless steel combination baggage coaches which had theretofore been in operation on the lines of the defendant B&M.

[fol. 3] 5. In the course of the aforesaid dealings defendants McGinnis, Glacy and Benson violated Section 10 of the Clayton Act, 15 U.S.C. 20, in that defendant McGinnis knowingly voted for, and defendants McGinnis, Glacy and Benson knowingly directed the act constituting the violation alleged in paragraph 4 of this indictment and aided and abetted in said violation.

IV. JURISDICTION AND VENUE

6. The aforesaid offenses were carried out within the District of Massachusetts within the five years preceding the return of this indictment.

COUNT TWO

V. DEFENDANTS

7. The allegations contained in paragraph 2 of this indictment are here realleged with the same force and effect as though set forth in full.

8. International Railway Equipment Corporation (hereinafter referred to as "International"), a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business at 150 Causeway Street, Boston, Massachusetts, is hereby indicted and made a defendant herein. International was incorporated in or about June 1957 as the International Mill and Steel Supply Corporation. In or prior to January 1958, the name was changed to its present style. Between July 1, 1958 and June 30, 1959, International's gross sales amounted to approximately $480,000, and consisted almost exclusively of the resale of equipment acquired from B&M.

[fol.4] 9. Henry Mersey, whose address is New Haven, Connecticut, is hereby indicted and made a defendant herein. During the period of time covered by this indictment Mersey was President of International.

VI. NATURE OF TRADE AND COMMERCE

10. The allegations contained in paragraph 3 of this indictment are here realleged with the same force and effect as though set forth in full.

VII. OFFENSE CHARGED

11. Between August 14, 1958 and December 16, 1958, the defendants McGinnis, Glacy, and Benson, having by virtue of their official relation to and position with the B&M powers of control, direction, supervision, and management over the moneys, funds, credits, securities, property and assets of the said B&M arising or accruing from or used in the aforesaid commerce, did, by arranging, permitting, authorizing, directing and carrying out a transaction pursuant to which eight (8) stainless steel passenger coaches and two (2) stainless steel combination baggage coaches were sold to International for $250,000, willfully misapply, and willfully permit to be misapplied moneys, funds, credits, securities, property and assets of the said B&M arising or accruing from or used in the aforesaid commerce; and did willfully convert to their own use moneys, funds, credits, securities, properties and assets of the said B&M to wit, $71,500; in violation of Section 660, Title 18, U.S. Code.

12. The aforesaid violations were effectuated by the said defendants in the manner hereinafter described. On or about April 30, 1958, one Waldo E. Bugbee, a dealer in used railroad equipment, called on defendant Glacy for the purpose of obtaining an option to purchase a certain 10 coaches then in service on B&M lines, for resale [fol. 5] to an undisclosed third party. Bugbee suggested a purchase price under the option of approximately $500,000. Defendant Glacy refused to grant the option. Thereafter, Bugbee was called on the telephone by Henry Mersey. Mersey was a stranger to Bugbee. Mersey informed Bugbee that he, Mersey, had the right to offer the said B&M coaches for sale. Thereafter, Mersey did offer them for sale to Bugbee's intended customer, the Wabash Railroad. In May 1958 defendants McGinnis and Glacy instructed subordinates at the B&M that no direct dealings were to be had with Bugbee and that

Mersey was to handle the sale of the said 10 coaches. At no time did Mersey purport to act as an agent or broker for the B&M but negotiated for the sale of the said 10 B&M coaches on his own account. In late July 1958, knowing that the Wabash Railroad was interested in said 10 coaches, defendants Benson and Glacy recommended to B&M's Board of Directors that the said 10 coaches be withdrawn from service and sold. Defendant McGinnis voted to approve the sale and each of the said defendants directed that the coaches be transferred to International at a price of $250,000. No competitive bidding was held. On August 14, 1958, title to the said 10 coaches was conveyed by a bill of sale executed by defendant Glacy on behalf of the B&M, the price of $250,000 having been paid by a check post-dated August 22, 1958. On August 15, 1958, International re-sold the said 10 coaches to a Wabash subsidiary at a price of $425,000.

13. At or about and shortly after the delivery of the said 10 coaches to International, moneys were delivered by International to defendants McGinnis, Glacy and Benson as follows:

[fol. 6]

August 13, 1958	—	Benson	—	$ 5,000
August 22, 1958	—	Glacy	—	$12,500
August 29, 1958	—	Glacy	—	$12,500
October 9, 1958	—	Benson	—	$ 1,500
October 10, 1958	—	McGinnis	—	$20,000
December 3, 1958	—	McGinnis	—	$15,000
December 16, 1958	—	Benson	—	$ 5,000

The foregoing sums were derived almost entirely out of the proceeds from the resale by International of the said 10 coaches. Upon the delivery of the aforesaid sums to defendants McGinnis, Glacy and Benson, the said defendants withheld the said moneys from the B&M, and retained them exclusively for their own account and use.

14. Between August 14, 1958 and December 16, 1958, defendants International and Mersey did aid and abet defendants McGinnis, Glacy, and Benson so to willfully and knowingly misapply and permit to be misapplied moneys, funds, credits, securities, property and assets

of the B&M as aforesaid, and to convert to the use of defendants McGinnis, Glacy, and Benson, moneys, funds, credits, securities, property and assets of the said B&M as set forth in paragraph 13 of this indictment (Title 18, U.S. Code, Sections 2 and 660).

VIII. JURISDICTION AND VENUE

15. The aforesaid offenses were carried out within the District of Massachusetts within the five years preceding the return of this indictment.

[fol. 7] A TRUE BILL.

/s/ William H. Orrick, Jr.
Assistant Attorney General
Department of Justice

/s/ Joseph J. Saunders
Attorney, Department of Justice

/s/ John H. Dougherty
Attorney, Department of Justice

/s/ Jack Pearce
Attorney, Department of Justice

/s/ Rueben F. Boynton
Foreman of the Grand Jury.

/s/ Stephen Moulton
Assistant United States Attorney.

[fol. 8]

DISTRICT OF MASSACHUSETTS

August 13, 1963 3:45 P.M.

Returned into the District Court by the Grand Jurors and filed

/s/ Frances R. Foley
Deputy Clerk.

[fol. 9]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

MOTION OF DEFENDANT BOSTON AND MAINE RAILROAD FOR BILL OF PARTICULARS—filed August 29, 1963

The Boston and Maine Railroad, defendant in the above-entitled proceeding, moves that the Court direct the United States of America to file a Bill of Particulars to Count ONE of the Indictment specifying as follows:

1. Whether the "person" alleged in paragraph III of Count ONE as having been the "selling officer and agent" of the defendant B&M in the transaction in question is the same "person" referred to in the previous clause of said paragraph as being on the board of directors and the president of the B&M.

2. If the answer to Particular No. 1 is negative, the name of the said "person".

3. With respect to the allegation of paragraph III of Count ONE to the effect that the defendant B&M had "upon its board . . . and as its selling officer . . . a person, who at the same time had a substantial interest in such other corporation" . . .

[fol. 10] (a) Whether "such other corporation" is International Railway Equipment Corporation,

(b) If the answer to 3(a) is negative, the same of "such other corporation",

(c) The nature and extent of the interest or interests of the said person or persons in "such other corporation".

BOSTON AND MAINE RAILROAD

By /s/ Edward B. Hanify
Ropes & Gray
Attorneys

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 11]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

MOTION OF THE DEFENDANT, PATRICK B. MCGINNIS, FOR BILL OF PARTICULARS—September 16, 1963

The defendant Patrick B. McGinnis moves that the Court direct the United States of America to file a Bill of Particulars to the indictment specifying as follows:

As to Count One:

1. With respect to paragraph 4 thereof, please specify:

(a) The articles of commerce with which the defendant, B&M, had dealings, if other than the ten coaches referred to in paragraph 4 and later in the indictment.

(b) The name of the "person" who acted as the selling officer and the name of the "person" who acted as the agent for B&M in the transaction described.

(c) The "substantial interest" which the defendant, Patrick B. McGinnis, is alleged to have had in International Railway Equipment Corporation (hereinafter referred to as "International").

(d) When is the defendant, McGinnis, alleged to have acquired his substantial interest in International.

(e) The "substantial interest" which the selling officer [fol. 12] is alleged to have had in International and when it is alleged to have been acquired by him.

(f) The "substantial interest" which the said agent is alleged to have had in International and when the same is alleged to have been acquired.

2. With respect to paragraph 5 thereof, specify or state:

(a) The date upon which the defendant McGinnis knowingly voted for the acts described in paragraph 4 of the indictment.

(b) Whether or not the defendant, McGinnis, is charged with knowing that the defendants Glacy and Ben-

son or Glacy or Benson had a substantial interest in International.

(c) Specify the substantial interest which McGinnis is alleged to have known that Benson and Glacey or either of them is alleged to have had in said International.

(d) Specify the "act" that McGinnis is alleged to have directed and the person or persons to whom, and the date or dates when, such direction was given.

As to Count Two:

3. With respect to paragraph 11 thereof:

(a) Specify in detail the acts performed by the defendant McGinnis in "arranging, permitting, authorizing, directing and carrying out" the transaction pursuant to which the coaches were sold to International. In complying with this specification, it is requested that the Government be ordered to give all dates, amounts and names wherever possible.

(b) Specify what monies, funds, credits, securities, property and assets of the B&M were willfully misapplied by the defendant McGinnis.

(c) Specify what monies, funds, credits, securities, [fol. 13] property, and assets of the B&M the defendant McGinnis willfully permitted to be misapplied.

(d) The names of all persons whom the defendant McGinnis willfully permitted to misapply assets of the B&M.

(e) What assets and property of the B&M were willfully misapplied by the defendant McGinnis.

(f) Each and every date on which the defendant McGinnis is alleged to have willfully misapplied or to have permitted the misapplication of money or property of the B&M.

(g) Give the date and amount or description of any monies and properties of the B&M which the defendant McGinnis is alleged to have converted to his own use.

4. With respect to paragraph 12 thereof:

(a) Specify the name of each and every subordinate to whom the defendant McGinnis is alleged to have given instructions not to deal with Bugbee or whom he is alleged to have instructed that Mersey was to handle the sale

of the coaches, and give the date or dates when such instructions were given.

(b) Specify the name of each and every person whom the defendant McGinnis is alleged to have "directed" that the coaches be transferred to International, and give the date or dates when such directions were allegedly given.

(c) Give the precise name of the Wabash subsidiary to which the coaches are alleged to have been resold and state the substantial terms of such resale including the time and manner of payments of the said $425,000 price.

5. With respect to paragraph 13 thereof:

[fol. 14] (a) State what portion, if any, of the $35,000 alleged to have been paid to McGinnis by International was derived from the proceeds of the resale by International.

(b) If not all of the $35,000 was derived from the resale by International, describe the source of those payments to McGinnis which were not derived from said resale.

6. With respect to paragraph 14 thereof: Specify in complete detail the manner in which International and Mersey allegedly aided and abetted the other individual defendants in carrying out the acts with which they are charged.

PATRICK B. MCGINNIS

By his Attorneys,

/s/ Lawrence R. Cohen

/s/ William T. Griffin
209 Washington Street
Boston 8, Massachusetts
CApitol 7-4500

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 15]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

MOTION OF DEFENDANT GEORGE F. GLACY FOR A BILL OF PARTICULARS—filed September 16, 1963

The defendant George F. Glacy, without waiving his motion to dismiss, but expressly relying on the same, moves that the Court direct the United States of America to file a Bill of Particulars to the Indictment as follows:

In Count One

In Paragraph 4:

1. Identify the person referred to as "its selling officer" (lines 5 and 6).
2. Identify the person referred to as "its agent in the particular transaction" (lines 6 and 7).
3. Identify the person or persons alleged to have had "a substantial interest in such other corporation" (lines 5-8).
4. Identify "such other corporation" (line 8).
5. Specify as to each person the nature and extent of his interest or interests in such other corporation (lines 7, 8).

In Paragraph 5:

6. With respect to the allegation that the defendant Glacy "directed the act constituting the violation alleged in paragraph 4" specify the acts of Glacy constituting [fol. 16] such direction, including the date or dates (as accurately as possible) and the person or persons to whom and the manner in which such directions were given (lines 4-6).
7. With respect to the allegation that the defendant Glacy "aided and abetted in said violation" specify the acts of Glacy constituting such aiding and abetting, including the date or dates (as accurately as possible) (lines 6, 7).

In Count Two

In Paragraph 11:

8. Specify the moneys, funds, credits, securities, property or assets of the Boston and Maine Railroad alleged to have been misapplied or permitted to be misapplied (lines 12-14).

GEORGE F. GLACY

By his Attorneys,

ELY, BARTLETT, BROWN & PROCTOR

/s/ Edward O. Proctor

/s/ Edward O. Proctor, Jr.
294 Washington St., Boston
HU. 2-2310

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 17]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

MOTION BY DEFENDANT DANIEL A. BENSON FOR BILL OF PARTICULARS—filed September 16, 1963

Without waiving his motion to dismiss the indictment, defendant Daniel A. Benson moves that the Court direct the United States of America to file a bill of particulars to the indictment as follows:

1. Identifying the person who, according to paragraph 4 of the indictment, Boston and Maine Railroad had "as its selling officer and as its agent in the particular transaction."

2. Naming the "other corporation" referred to in paragraph 4 of the indictment.

3. Specifying the nature and extent of the "substantial interest" in such other corporation referred to in paragraph 4 of the indictment.

4. Specifying the manner in which defendant Benson is alleged by paragraph 5 of the indictment to have "directed the act."

5. Giving the date or dates on which defendant Benson is alleged by paragraph 5 of the indictment to have "directed the act."

6. Specifying the acts of defendant Benson by which he is alleged by paragraph 5 of the indictment to have "aided and abetted in said violation."

7. Giving the date or dates on which defendant Benson is alleged to have "aided and abetted in said violation."

8. Specifying the moneys, funds, credits, securities, property or assets of Boston and Maine Railroad which are alleged to have been misapplied by defendant Benson according to paragraph 11 of the indictment.

[fol. 18] 9. Specifying the moneys, funds, credits, securities, property and assets of Boston and Maine Railroad which are alleged to have been converted by defendant Benson according to paragraph 11 of the indictment.

10. Naming the "subordinates" who are alleged by paragraph 12 of the indictement to have been instructed by defendants McGinnis and Glacy that no direct dealings were to be had with Bugbee and that Mersey was to handle the sale of the 10 coaches.

11. Naming the "Wabash subsidiary" to whom International resold the 10 coaches according to paragraph 12 of the indictment.

12. Specifying what part of the sums alleged by paragraph 13 of the indictment to have been received by each of the defendants was derived of the proceeds of the resale by International.

By his attorneys,

WITHINGTON, CROSS, PARK & MCCANN

/s/ Claude B. Cross

/s/ John M. Reed
73 Tremont Street
Boston, Massachusetts
Telephone: CA7-0185

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 19]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Action No. 63-252-S

UNITED STATES OF AMERICA

vs.

BOSTON AND MAINE RAILROAD ET ALS

MEMORANDUM—entered—October 8, 1963

SWEENEY, Ch. J. All of the motions to dismiss the indictment and for severance and separate trials are denied.

The Motion of the defendants International Railway Equipment Corporation and Henry Mersey to inspect and copy documents was withdrawn in open court.

The Motion of the defendant Boston & Maine Railroad for a Bill of Particulars is allowed in full.

The Motion of the defendant George F. Glacy for a Bill of Particulars is allowed as to Paragraph 4 of the indictment. It is denied as to Paragraphs 5 and 11.

The Motion of the defendant Daniel A. Benson for a Bill of Particulars is allowed as to items numbered 1, 2, 3, and denied as to all others.

The Motion of the defendants International Railway Equipment Corporation and Henry Mersey for a Bill of Particulars is denied in full.

All of the Motions to Strike are denied. Any matters complained of because of their possible inflammatory effect on the jurors need not be drawn to the attention of the jury as it is not customary to read indictments to the jury, and they would be read only upon the insistence of the defendants.

[fol. 20]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Action No. 63-252-S

UNITED STATES OF AMERICA

v.

BOSTON AND MAINE RAILROAD, ET AL

SUPPLEMENTAL MEMORANDUM—entered—
November 19, 1963

SWEENEY, CH. J. Through inadvertence, the court's Memorandum of October 8, 1963, did not pass upon the motion of the defendant Patrick B. McGinnis for a Bill of Particulars. It is the intention of the court to allow the McGinnis motion to the same extent and no more than was allowed in the companion cases.

Accordingly, the motion of the defendant McGinnis for a Bill of Particulars is allowed as to paragraph 1 of the motion with particular reference to subparagraphs (b), (c), (e) and (f); the balance of the motion is denied.

When all of the particulars ordered have been furnished, the court will hear defendants' motions to raise a defense under Rule 12(b)(1).

[fol. 21]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

BILL OF PARTICULARS—filed November 7, 1963

Now comes the United States of America, by John H. Dougherty and Jonathan Rose, Attorneys, Department of Justice, and Stephen Moulton, Assistant United States Attorney, Boston, Massachusetts, and, in compliance with the order of this Court entered October 8, 1963, files herewith its bill of particulars concerning the indictment in this cause, and, in this connection, says:

1. With respect to: The motion of defendant Boston & Maine Railroad (except paragraph 3(c) thereof); the motion of defendant Glacy as to paragraph 4 of of the indictment (except paragraph 5 of said motion); and the motion of defendant Benson (except paragraph 3 of said motion)—

(a) Defendant Glacy is the person who is referred to in paragraph 4 of the indictment as the person whom defendant B&M "had as its selling officer and as its agent in the particular transaction."

(b) The corporation which is referred to in paragraph 4 of the indictment as "another cor-
[fol. 22] poration" and as "such other corporation" is defendant International Railway Equipment Corporation.

2. With respect to: Paragraph 3(c) of the motion of defendant Boston & Maine Railroad; paragraph 5 of the motion of defendant Glacy; and paragraph 3 of the motion of defendant Benson—.

The substantial interest of defendants McGinnis and and Glacy in defendant International consisted of an un-

derstanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B&M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies.

Respectfully submitted,

/s/ John H. Dougherty
Attorney, Department of Justice

/s/ Jonathan Rose
Attorney, Department of Justice

/s/ Stephen Moulton
Assistant United States Attorney

[fol. 23]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

MOTION OF DEFENDANT GEORGE F. GLACY TO DISMISS COUNT 1 OF THE INDICTMENT—filed November 14, 1963

Now comes the defendant George F. Glacy, after the filing by the Government of its bill of particulars, and moves that Count 1 of the indictment be dimissed on the ground that said indictment as now defined by the bill of particulars does not state an offense; more particularly in that the relationship described in particular number

2 does not as matter of law constitute a substantial interest of the defendants McGinnis and Glacy in defendant International Railway Equipment Corporation within the meaning of Section 10 of the Clayton Act, 15 U.S.C. 20.

By his Attorneys,

ELY, BARTLETT, BROWN & PROCTOR

/s/ Edward O. Proctor
294 Washington St., Boston
[HU. 2-2310]

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 24]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

MOTION OF DEFENDANT DANIEL A. BENSON TO DISMISS COUNT 1 OF THE INDICTMENT AS DEFINED BY THE BILL OF PARTICULARS—filed November 15, 1963

Defendant Daniel A. Benson, after the filing of a bill of particulars, now moves that Count 1 of the indictment be dismissed on the ground that said indictment as now defined by the bill of particulars does not state facts sufficient to constitute an offense by defendant Benson against the United States.

By his Attorneys,

WITHINGTON, CROSS, PARK & MCCANN

/s/ Claude B. Cross
/s/ John M. Reed

[fol. 25] CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 26]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

Allowed as to Count 1—see memo denied as to Count II
s/ G. C. Sweeney 12-3-63

MOTION OF DEFENDANT, PATRICK B. MCGINNIS, FOR RECONSIDERATION OF HIS MOTION TO DISMISS COUNTS ONE AND TWO OF THE INDICTMENT—filed November 15, 1963

Now comes the defendant, Patrick B. McGinnis, after the filing by the Government of its Bill of Particulars, and moves that this Honorable Court reconsider his motion to dismiss the indictment filed on September 16, 1963, and denied by this Court on October 8, 1963.

In support of this motion, this defendant says:

As to Count One:

1. That on November 5, 1963, the Government filed a Bill of Particulars concerning the indictment in this cause which defined the alleged "substantial interest" of the defendants McGinnis and Glacy in International Railway Equipment Corporation as consisting of:

> ". . . an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International and others, for, among other things, the purpose of *producing profits for International from dealings by it in property acquired from the B & M* through the intervention, direction or assistance of defendants
> [fol. 27] McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson *were to and did receive substantial monies.*" (Emphasis ours.)

2. The Bill of Particulars thus attempt to enlarge the indictment by alleging a concert of action among certain of the defendants.

3. The "substantial interest" as described by the Bill of Particulars does not as a matter of law constitute a substantial interest of the defendants McGinnis and Glacy in the defendant International within the meaning of Section 10 of the Clayton Act.

As to Count Two:

1. Paragraphs 11 and 13 of the indictment allege, in effect, that the defendants McGinnis, Glacy, and Benson converted to their own use and withheld from the B&M a total of $71,500 which belonged to the B&M.

2. The Bill of Particulars specifies that the acts of McGinnis and Glacy produced profits *for International* arising out of property acquired by International from the B&M. The allegations in the indictment are inconsistent with those in the Bill of Particulars. The latter describes an offense, if any, in which the transfer of title to International is the central act, whereas the offense described in the indictment arises entirely from the withholding of funds belonging to the B&M.

By his Attorneys,

/s/ Lawrence R. Cohen

/s/ William T. Griffin
209 Washington Street
Boston 8, Massachusetts
CApitol 7-4500

[fol. 28]

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 29]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

Denied as to "acquittal" allowed as to "dismissal"
(See memo) s/ G. C. Sweeney 12-3-63

MOTION OF DEFENDANT BOSTON AND MAINE RAILROAD FOR JUDGEMENT OF ACQUITTAL OR, ALTERNATIVELY, TO DISMISS—filed November 19, 1963

Boston and Maine Railroad moves for entry of a judgment of acquittal as to it in the above captioned Indictment on the ground that the Bill of Particulars filed November 7, 1963, especially paragraph 2 thereof, shows that the evidence to be introduced by the government in support of the Indictment will be insufficient to sustain a conviction of the defendant Railroad for the offense charged in the Indictment. Alternatively, if an acquittal is denied, Boston and Maine Railroad moves for dismissal of the action as to it on the aforesaid ground.

BOSTON AND MAINE RAILROAD

/s/ Edward B. Hanify

/s/ George C. Caner, Jr.
Ropes & Gray
Its Attorneys

[fol. 30]

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 31]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Action No. 63-252-S

UNITED STATES OF AMERICA, PLAINTIFF

v.

BOSTON AND MAINE RAILROAD, ET AL, DEFENDANTS

MEMORANDUM—entered—December 3, 1963

SWEENEY, CH. J. There are before me motions of the defendants Boston and Maine Railroad, Daniel A. Benson, Patrick B. McGinnis and George F. Glacy to dismiss Count I of the indictment in the above case in the light of a Bill of Particulars filed by the government. In this Count of the indictment the defendants are charged with violation of Section 10 of the Clayton Act (15 U.S.C. 20) which provides "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, . . . with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, ..." except by competitive bidding.

The government concedes that there are no interlocking directors, and it bases its case upon the allegation that the named individual defendants had a "substantial interest" in the defendant International. The Bill of Par-
[fol. 32] ticulars discloses that the "substantial interest" in this case consists of "an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, di-

rection or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did deceive substantial monies."

The motions to dismiss Count I of the indictment are allowed on the basis of my construction of the statute. I rule as a matter of law that the words "any substantial interest" as used in the statute do not cover a situation such as here presented. The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International.

[fol. 33]

IN UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed January 2, 1964.

I. Notice is hereby given that the United States of America appeals to the Supreme Court of the United States from the order of the United States District Court for the District of Massachusetts, entered December 3, 1963, dismissing Count One of an indictment charging the defendants Boston and Maine Railroad, Patrick B. McGinnis, George F. Glacy, and Daniel A. Benson, with violation of Section 10 of the Clayton Act, c. 323, § 10, 38 Stat. 734, 15 U.S.C. 20. This appeal is taken pursuant to Title 18, United States Code, Section 3731.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States, and include in said transcript the following:

1. Transcript of docket entries.
2. Indictment filed August 13, 1963.
3. Motions for bill of particulars filed by defendants:
   (a) Boston and Maine Railroad, August 29, 1963;
   (b) Patrick B. McGinnis, September 16, 1963;
   (c) George F. Glacy, September 16, 1963;
   (d) Daniel A. Benson, September 16, 1963.
4. Orders requiring United States of America to file a bill of Particulars:
   (a) entered October 8, 1963;
   (b) entered November 19, 1963.

[fol. 34] 5. Bill of particulars filed by United States of America November 7, 1963.

6. Motions to dismiss Count One filed by defendants:
   (a) Boston and Maine Railroad November 19, 1963;
   (b) Patrick B. McGinnis November 15, 1963;
   (c) George F. Glacy November 14, 1963;
   (d) Daniel A. Benson November 15, 1963.
7. Decision dismissing Count One of indictment dated December 3, 1963 and entered December 3, 1963.
8. This Notice of Appeal to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. The indictment alleges that the defendants, the Boston & Maine Railroad, its president and director, and two of its vice-presidents, one of whom acted as selling agent, sold, without competitive bidding, railroad property worth in excess of $50,000 to International Railway Equipment Corporation, a corporation in which the individual defendants had a substantial interest, in violation of Section 10 of the Claytoan Act, c. 323, § 10, 38 Stat. 734, 15 U.S.C. 20. The bill of particulars alleges

that the substantial interest was an "understanding, agreement, relationship, arrangement and concert of action among the said defendants . . . and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which" those defend- [fol. 35] ants received "substantial moneys." The question is whether, as a result of the foregoing "understanding, etc.," the designated officers of the B & M had "any substantial interest" in International.

2. Whether the words "any substantial interest" as used in Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 20 are limited in their application to a "then present legal interest."

/s/ Robert B. Hummel

/s/ D. Daniel Stewart, Jr.
Attorneys, Department of Justice

/s/ W. Arthur Garrity, Jr.
United States Attorney,
District of Massachusetts

[fol. 36]

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 37] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 38]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

Allowed George C. Sweeney 2-14-64

MOTION OF THE UNITED STATES FOR ENLARGEMENT OF THE TIME FOR DOCKETING CASE AND FILING RECORD AND STATEMENT AS TO JURISDICTION—filed February 12, 1964

1. The United States of America, by the undersigned, respectfully moves this Court pursuant to Rule 13 of the Rules of the Supreme Court for an enlargement to and including May 1, 1964 of the time for docketing the case in the appeal of the United States herein to the Supreme Court and filing the record thereof with the clerk of the Supreme Court together with the printed statement as to jurisdiction required by paragraph 2 of said Rule 13. Such time presently expires March 2, 1964.

2. In support of said motion the undersigned states that the attorneys handling appellate matters for the United States in the Supreme Court, because of a very heavy calendar of cases pending in the Supreme Court, have not had the time for the study necessary to preparation of the jurisdictional statement, and feel another sixty days will be necessary therefor.

3. Counsel for the defendants have stated to the undersigned that they have no objection to the enlargement of time sought by this motion.

Respectfully submitted,

/s/ John H. Dougherty
Attorney, Department of Justice

[fol. 39]

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 40]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

ORDER OF ENLARGEMENT OF TIME FOR DOCKETING CASE AND FILING RECORD AND STATEMENT AS TO JURISDICTION—dated February 14, 1964

On motion of the United States, the defendants consenting, it is ORDERED that the time for docketing said case and filing the record thereof with the Clerk of the Supreme Court of the United States, together with the printed statement as to jurisdiction required by paragraph 2 of Rule 13 of the Rules of the Supreme Court, be enlarged to and including May 1, 1964.

GEORGE C. SWEENEY
United States District Judge

2-14-64

[fol. 41]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

Allowed George C. Sweeney 4-28-64

MOTION OF THE UNITED STATES FOR ENLARGEMENT OF THE TIME FOR DOCKETING CASE AND FILING RECORD AND STATEMENTS TO JURISDICTION—filed April 27, 1964

1. The United States of America, by the undersigned, respectfully moves this Court pursuant to Rule 13 of the Rules of the Supreme Court for a further enlargement

to and including June 1, 1964 of the time for docketing the case in the appeal of the United States herein to the Supreme Court and filing the record thereof with the clerk of the Supreme Court together with the printed statement as to jurisdiction required by paragraph 2 of said Rule 13. Such time presently expires May 1, 1964.

2. In support of said motion the undersigned state that the attorneys handling appellate matters for the United States in the Supreme Court, because of a very heavy calendar of cases pending in the Supreme Court, still have not had the time for the study necessary to preparation of the jurisdictional statement, and feel another additional month sought by this motion will be necessary therefor.

3. Counsel for the defendants have stated to the undersigned that they have no objection to the enlargement of time sought by this motion.

Respectfully submitted,

/s/ John H. Dougherty,
Attorney, Department of Justice

/s/ Jonathan Rose
Attorney, Department of Justice

/s/ Stephen Moulton
Assistant United States Attorney

[fol. 42]

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 43]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[File Endorsement Omitted]

ORDER OF ENLARGEMENT OF TIME FOR DOCKETING CASE AND FILING RECORD AND STATEMENT AS TO JURISDICTION—dated April 28, 1964

On motion of the United States, the defendants consenting, it is ORDERED that the time for docketing said case and filing the record thereof with the Clerk of the Supreme Court of the United States, together with the printed statement as to jurisdiction required by paragraph 2 of Rule 13 of the Rules of the Supreme Court, be enlarged to and including June 1, 1964.

GEORGE C. SWEENEY
United States District Judge

4-28-64

[fol. 44]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

[File Endorsement Omitted]

NOTICE OF THE UNITED STATES FOR ENLARGEMENT OF THE TIME FOR DOCKETING CASE AND FILING RECORD AND STATEMENTS TO JURISDICTION—filed May 28, 1964

1. The United States of America, by the undersigned, respectfully moves this Court pursuant to Rule 13 of the

Rules of the Supreme Court for a further enlargement to and including July 1, 1964 of the time for docketing the case in the appeal of the United States herein to the Supreme Court and filing the record thereof with the clerk of the Supreme Court together with the printed statement as to jurisdiction required by paragraph 2 of said Rule 13. Such time presently expires June 1, 1964.

2. In support of said motion the undersigned state that the attorneys handling appellate matters for the United States in the Supreme Court are presently engaged in work on the appeal herein. Because of a very heavy calendar of cases pending in the Supreme Court, they have only within recent days had the opportunity to begin study of the matters involved in the appeal. They feel that the time remaining until June 1, 1964, is not sufficient for the study and preparation necessary to completion of the jurisdictional statement and that the enlargement thereof requested herein will be necessary.

[fol. 45] 3. Counsel for the defendants have stated to the undersigned that they have no objection to the enlargement of time sought by this action.

Respectfully submitted,

/s/ John H. Dougherty
Attorney, Department of Justice

/s/ Jonathan Rose
Attorney, Department of Justice

/s/ Stephen Moulton
Assistant United States Attorney

[fol. 46]

CERTIFICATE OF SERVICE
[omitted in printing]

[fol. 47]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted]

ORDER OF ENLARGEMENT OF TIME FOR DOCKETING CASE AND FILING RECORD AND STATEMENT AS TO JURISDICTION—dated May 28, 1964

On motion of the United States, the defendants consenting, it is ORDERED that the time for docketing said case and filing the record thereof with the Clerk of the Supreme Court of the United States, together with the printed statement as to jurisdiction required by paragraph 2 of Rule 13 of the Rules of the Supreme Court, be enlarged to and including July 1, 1964.

GEORGE C. SWEENEY
United States District Judge

Date: 5-28-64

[fol. 48]

SUPREME COURT OF THE UNITED STATES
No. 232, October Term, 1964

UNITED STATES, APPELLANT

vs.

BOSTON AND MAINE RAILROAD, ET AL.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1964

APPEAL from the United States District Court for the District of Massachusetts.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 747698 310

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CITATIONS

786-473—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

BOSTON AND MAINE RAILROAD, PATRICK B. MCGINNIS, GEORGE F. GLACY, AND DANIEL A. BENSON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the district court (App. *infra*, pp. 17–18) is reported at 225 F. Supp. 577.

JURISDICTION

The decision of the district court dismissing Count I of the indictment was rendered on December 3, 1963 (App. *infra*, p. 17). On January 2, 1964, the United States filed a notice of appeal, and the district court has extended the time for docketing the appeal to July 1, 1964. Since the district court's order dismissing Count I was based solely upon the court's construction

of Section 10 of the Clayton Act, this Court has jurisdiction to review that order on direct appeal under the Criminal Appeals Act, 18 U.S.C. 3731. *United States* v. *Borden Co.*, 308 U.S. 188; *United States* v. *Healy*, 376 U.S. 75.

QUESTION PRESENTED

Section 10 of the Clayton Act prohibits a common carrier with officers who have "any substantial interest in" another corporation from commercial dealings with that corporation in an amount exceeding $50,000 annually, except on the basis of competitive bidding. The question presented is whether officials of a carrier who entered into an agreement and understanding with another firm under which they (1) arranged to have the carrier sell its equipment to such other firm for resale and (2) were to receive substantial monies from such firm, had a "substantial interest in" such firm.

STATUTE INVOLVED

Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 20 provides:

> No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer,

or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. * * *

* * * * *

If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

STATEMENT

Count I of a two-count indictment (R. 1–8), returned on August 13, 1963, charged the Boston and Maine Railroad and three of its officers (Patrick B. McGinnis, President and Director; George F. Glacy, Vice President; and Daniel A. Benson, Vice President) with violating Section 10 of the Clayton Act. That section requires that dealings between an interstate common carrier and another corporation in the amount of more than $50,000 in any one year be con-

ducted by competitive bidding "when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation * * *"

Count I alleges (R. 1–3) that, without competitive bidding, the B & M sold 8 stainless steel passenger coaches and 2 stainless steel combination baggage coaches valued in excess of $50,000 to the International Railway Equipment Corporation ("International"), and that the B & M "had upon its board of directors and as its president a person, and had as its selling officer and as its agent in the particular transaction a person, who at the same time had a substantial interest in" International. The B & M officers were named as defendants under a provision of Section 10 that makes every "director, agent, manager, or officer * * * who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation * * *" guilty of a misdemeanor.[1]

[1] Count II of the indictment, which is based upon the sale of the same equipment as Count I, charges defendants McGinnis, Glacy, Benson, International and Henry Mersey, President of International, with violating 18 U.S.C. 660. That section provides:

> Whoever, being a president, director, officer, or manager of * * * [a] corporation engaged in commerce as a common carrier, * * * embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of

The government filed a bill of particulars which stated that the substantial interest that McGinnis and Glacy had in International was an "understanding,

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> the moneys, funds, credits, securities, property, or assets * * * or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

* * * * *

Count II alleges as follows (R. 3–6): About April 30, 1958, Waldo E. Bugbee, a dealer in used railroad equipment, attempted to obtain from B & M Vice President Glacy an option to purchase 10 B & M coaches then in service for resale to an undisclosed third party at a suggested purchase price of $500,000. Glacy refused to grant the option. McGinnis and Glacy instructed B & M officials that no direct dealings were to be had with Bugbee, and that Mersey, President of International, would handle the sale of the B & M coaches. Mersey then contacted Bugbee and indicated that he, Mersey, had the right to offer for sale the B & M equipment. Mersey negotiated the sale to Bugbee's intended customer, The Wabash Railroad, for his own account and at no time purported to act as an agent or broker for the B & M. Benson and Glacy recommended to the B & M board of directors that the 10 coaches be withdrawn from service and sold. As a director, McGinnis voted to approve the sale, and Glacy and Benson directed that the coaches be transferred to International at a price of $250,000. On August 14, 1958, title was conveyed by a bill of sale executed by Glacy on behalf of B & M in return for a check post-dated to August 22, 1958. On the next day, International resold the coaches to a Wabash subsidiary for $425,000. Within a short time after the transfer of the equipment, International paid McGinnis $35,000, Glacy $25,000 and Benson $11,500 from funds that were derived almost entirely from the proceeds of International's resale of the coaches to the Wabash.

The indictment also alleges that between July 1, 1958, and June 30, 1959, International's gross sales, which amounted to approximately $480,000, consisted almost exclusively of the resale of equipment acquired from B & M (R. 3).

agreement * * * and concert of action among the said defendants McGinnis, Glacy and International, and others, for * * * the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies" (R. 22). The defendants then moved to dismiss Count I, upon the ground that the bill of particulars did not show that McGinnis and Glacy had a "substantial interest" in International within the meaning of Section 10 of the Clayton Act (R. 22, 26, 28, 29).

On December 3, 1963, the court granted the motions to dismiss "on the basis of my construction of the statute." The court ruled that "the words 'any substantial interest' as used in the statute do not cover a situation such as here presented. The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International." (App. *infra*, p. 18.)

THE QUESTION IS SUBSTANTIAL

Section 10 of the Clayton Act prohibits any carrier from having any substantial business dealing with any firm, except through competitive bidding, when a director, the president, manager, purchasing or sell-

ing officer, or agent in the particular transaction, also is a director, or the manager, or purchasing or selling officer of, or "has any substantial interest in," such other firm. The question which this appeal presents is whether officers of a carrier who have entered into an agreement with another firm to sell the carrier's property to that firm for the purpose of enabling the latter to resell it at a profit with the understanding that they are to receive substantial monies thereby, have a "substantial interest" in the other firm within the meaning of that prohibition. We submit that, contrary to the ruling of the district court, such participation in "an illegal and illicit plan to siphon off for [their] personal benefit property of the Boston and Maine Railroad through the medium of International" (App. *infra*, p. 18), did give the B & M's officers a "substantial interest in" International.

1. Section 10 is designed to protect the nation's common carriers from the economic injury they might suffer if substantial purchases and sales were made without competitive bidding between the carriers and firms with which the carriers' officers and directors had interlocking relationships.[2] The federal interest

[2] In discussing a situation where the carrier was a purchaser, rather than a seller as in the present case, this Court stated: "The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest." *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 190.

has three aspects: (1) protecting the strength of the national transportation system; (2) maintaining the integrity of the assets and accounts upon which rate regulation rests; (3) preserving the system of free and fair competition among industries dealing with carriers. To these ends, the statute condemns four specific categories of interlocks which create a sufficiently serious conflict of interest on the part of the carrier's official so that he might favor his other firm at the expense of the carrier: where the carrier's official or director is a (1) director, (2) manager, or (3) purchasing or (4) selling officer of the firm with which the carrier is dealing. In addition, the Act has a fifth general category of proscribed relationships—where the carrier's official or director "has any substantial interest in" such other firm.

We submit that the latter broad phrase was intended to cover any other interlocking relationship besides the four specified that gives the carrier's official a sufficiently significant interest in the other firm as to cause divided loyalties on his part. It cannot properly be limited, as the district court ruled (App. *infra*, p. 18), to "a then present legal interest in the buying corporation."

Section 10 resulted from disclosures that unethical railroad officials had engaged in stock watering and had siphoned off the assets of railroads through the medium of contracts with supply and construction firms (See, *e.g.*, 51 Cong. Rec. 9182, 9185, 9261; S. Doc. No. 543, 63rd Cong., 2d Sess., pp. 29–30.). As passed by the House, the predecessor of Section 10 (which was

Section 9 of the House bill) contained a blanket prohibition upon any person who was a director or officer of a company engaged in, or himself engaged in, the business of selling equipment, materials or supplies to, or maintaining or constructing common carriers, or acting as underwriter of a carrier's securities, from acting as a director, officer or employee of any carrier to which his firm sold or for which it did such work. H.R. 15657, 63rd Cong., 2d Sess.; see H. Rep. No. 627, 63rd Cong., 2d Sess., pp. 17–18. The Senate substituted for the absolute prohibition on such transactions in the House bill a prohibition upon any person serving as a director, president, manager or purchasing officer or agent of any common carrier who was also an officer, director, manager or general agent of, "or who has any direct or indirect interest in," any firm from which the carrier made purchases or had any dealings in securities, railroad supplies or other articles of commerce amounting to more than $50,000 in any year, unless they were made through competitive bidding. S. Rep. No. 698, 63rd Cong., 2d Sess., pp. 63–65. The Senate Committee explained (*id.* at 47–48) that the "prime object" of the House provision is:

> to prevent common or interlocking directors in corporations which occupy the relations to each each other which are thus described; and is mainly intended to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers, often being practically both seller and purchaser * * * . While this evil is fully appreciated, the committee nevertheless

> recognize that, especially in the case of railroads, emergencies may arise when absolutely prohibitory law against such dealings would be most injurious to be public. * * * The Committee have, therefore, recommended a substitute for the House paragraph on this subject, which, with the publicity, competitive bidding and the supervision of the Interstate Commerce Commission provided for, will, it is believed, minimize if not wholly cure the evil to be reached.

In conference, the provision was shortened and simplified and the phrase "any direct or indirect interest in" was changed, without explanation, to its present wording of "any substantial interest in" (51 Cong. Rec. 15791).

While the major thrust of Section 10 was against interlocking relationships whereby the same individual served as a director or official of both the carrier and the firm with which it dealt, we think that by inserting the words "any substantial interest in" such other firm Congress intended also to reach another situation, namely, where a director or official of a common carrier, although not serving in a similar capacity in the other firm, had a financial relationship to that firm that was likely to lead him to favor it to the detriment of the carrier. In short, the phrase was intended to reach the kind of divided loyalties that give rise to a "conflict of interest," *i.e.*, where someone is "interested in" the other side of the transaction. Indeed, Senator Chilton, one of the conferees, described the prohibition in its application to the sale of carrier securities, as covering "anyone who at the same time

occupies a trust capacity or *is interested in* another corporation with which the dealings may be had" (51 Cong. Rec. 16003; emphasis added).[3]

This interpretation of the statute is, we believe, confirmed by the explanation of the conference bill which Senator Chilton gave on the floor of the Senate. He pointed out (51 Cong. Rec. 16002) that Section 10 "makes it impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," and that its purpose was to enforce "honest, open methods * * * in purchasing and constructing by the common carriers. No honest management has anything to fear from this section, but it has a severe penalty that will deter the dishonest manipulator" (*id.* at 16003). He further explained (*id.* at 15943):

> It not only prevents corporations which are interlocked by officers and directors, but it says: "Or who has any substantial interest in such of them."
>
> The Senator will recall all we had before us, the ease by which interlocking directorates could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation

[3] Contemporary writers similarly viewed the statutory provision as having such a comprehensive reach. They deemed it to require competitive bidding whenever the outside concern is one "in which any director or any of certain specified officers of the railroad is interested" (Durand, *The Trust Legislation of 1914*, 29 Quarterly Journal of Economics, 72, 89 (1915)), or in which such persons have "any direct or indirect interest in any other connection which may conflict therewith" (Ripley, *Railroads, Finance and Organization*, 454 (1915)).

> and accomplish the same thing as if you were on the board yourself.
>
> * * * * *
>
> * * * They cannot dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the common carrier in the supply company, as the Senator chooses to call it, then it is prohibited.

In view of the Congressional intention "to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers" and to make it "impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," it is hardly likely that Congress intended to require competitive bidding where the carrier's president is merely one of several directors of the firm with which it deals, but not to require such protection where he stands to receive substantial payments from the other firm as a result of its dealings with the carrier. The understanding which McGinnis and Glacy had with International was far more likely to influence them to favor International at the expense of the B & M than would be the case if one of them were merely a director of International but were not to receive any portion of its profits. In the latter situation, the statute would plainly apply; should the result be different where the danger of injury to the carrier is far greater? There is nothing in the broad words "*any* substantial interest in" (emphasis added) which requires such a conclusion.

and the basic aim of the statute points in the other direction.[4]

2. The indictment in this case, as amplified by the bill of particulars, alleged that the "substantial interest" which McGinnis and Glacy had in International "consisted of an understanding, agreement, relationship, arrangement and concert of action among * * * McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies." As the district court held (App. *infra*, p. 18), the indictment charged "an illegal and illicit plan to siphon off for [their] personal benefit property of the Boston and Maine Railroad through the medium of International."

This understanding and agreement among McGinnis, Glacy and International gave the two individuals a "substantial interest in" the corporation. They undertook to arrange for International to acquire property from the B & M which International would

[4] The fact that another provision of the Clayton Act (Section 9, now 18 U.S.C. 660) made embezzlement, stealing, abstracting, willful misapplication or conversion by officers of a common carrier a felony, does not cast any doubt upon our argument. Section 10, as we construe it, does not duplicate Section 9. For it is designed to reach those interlocking relationships which, although not involving any embezzlement, stealing, etc., from the carrier, nevertheless pose a sufficient danger of divided loyalty to require that the transaction have the protection of competitive bidding.

then sell at a profit, and in return for which they were to receive "substantial monies," presumably out of the profits on such sales.[5] They could thus look forward to receiving a share of the profits which International expected to make in its dealing in the B & M property which they procured for it. This expectation of sharing in such profits obviously had a significant influence upon their judgment when, in their capacity as B & M officials, they decided to sell the carrier's property to International. It was a real and practical expectation which they could count on, and which in fact International honored. This expectation constituted a "substantial interest in" International within the meaning of Section 10.

This conclusion is supported by this Court's decision in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520. The major question in that case was whether the activities of Wensell on behalf of the United States in connection with the negotiation of a contract between it and the Generating Company for the construction of a power plant violated the federal conflict-of-interest statute, 18 U.S.C. 434. That statute makes it unlawful for anyone who, "being an of-

[5] The actual operation of this scheme, so far as it involved the sale of the ten cars involved in this case, is set forth in Count II of the indictment. That count alleged that after the B & M had rejected a proposal to grant a dealer an option to purchase the cars for resale at $500,000, the President of International negotiated their sale to the dealer's customer. The B & M turned the cars over to International for $250,000; the following day International resold them for $425,000; shortly thereafter International paid McGinnis $35,000, Glacy $25,000 and Benson $11,500, with funds that were derived almost entirely from the sale of the cars. See *note 1*, *supra*, pp. 4–5.

ficer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation * * * or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity * * *." Wenzell acted as a special consultant to the United States in preliminary negotiations with the Generating Company; at the same time, he was a vice-president and director of the First Boston Company, one of the country's major financial institutions and investment bankers. The Court held that Wenzell, because of his connection with First Boston, was "directly or indirectly interested in the pecuniary profits or contracts" of the Generating Company, since "if a contract between the Government and the sponsors was ultimately agreed upon, there was a substantial probability that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing for the proposed Memphis project" (364 U.S. at 555). Thus, as an officer and director of First Boston, Wenzell "could expect to benefit from any agreement that might be made between the Government and the sponsors" (*ibid.*), and that expectation was sufficient to bring him within the coverage of the statute. Cf., also, *Securities and Exchange Commission* v. *Dumaine,* 218 F. 2d 308 (C.A. 1); *Adams* v. *United States,* 302 F. 2d 307 (C.A. 5).

Of course, the *Mississippi Valley* case involved a different statute. But its significant point for this case is the Court's recognition that Wenzell's expectation of profits from his affiliation with First Boston

if the contract were entered into gave him the kind of interest in the contract which "made it difficult for him to represent the Government with the singleness of purpose required by the statute" (364 U.S. at 559). By the same reasoning, we submit that McGinnis and Glacy's expectation, based upon an agreement, to receive a share of the profits which International would make on its dealings in the B & M property, gave them a "substantial interest in" International. Indeed, their interest was more substantial than Wenzell's. For when Wenzell was representing the United States, it was far from certain that First Boston would ever receive any compensation from the Mississippi Valley Generating proposal. But when McGinnis and Glacy sold B & M property to International at a price which would enable the latter to resell it immediately at a substantial profit (see note 1, *supra*, pp. 4–5), there was no uncertainty that they would receive substantial monies therefrom.

CONCLUSION

This appeal presents a substantial question of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1964.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal Action No. 63–252–S

UNITED STATES OF AMERICA, PLAINTIFF

v.

BOSTON AND MAINE RAILROAD, ET AL., DEFENDANTS

MEMORANDUM

December 3, 1963

SWEENEY, Ch. J. There are before me motions of the defendants Boston and Maine Railroad, Daniel A. Benson, Patrick B. McGinnis and George F. Glacy to dismiss Count I of the indictment in the above case in the light of a Bill of Particulars filed by the government. In this Count of the indictment the defendants are charged with violation of Section 10 of the Clayton Act (15 U.S.C. 20) which provides "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce * * * with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, * * *" except by competitive bidding.

The government concedes that there are no interlocking directors, and it bases its case upon the allegation that the named individual defendants had a "substantial interest" in the defendant International. The Bill of Particulars discloses that the "substantial interest" in this case consists of "an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B&M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

The motions to dismiss Count I of the indictment are allowed on the basis of my construction of the statute. I rule as a matter of law that the words "any substantial interest" as used in the statute do not cover a situation such as here presented. The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International.

U.S. GOVERNMENT PRINTING OFFICE: 1964

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CITATIONS

In The

Supreme Court Of The United States

OCTOBER TERM, 1964

No. 232

UNITED STATES OF AMERICA, *Appellant*

v.

BOSTON AND MAINE RAILROAD ET AL, *Appellees*

On Appeal from the United States District Court for the District of Massachusetts

MOTION OF BOSTON AND MAINE RAILROAD TO AFFIRM JUDGMENT BELOW

Appellee Boston and Maine Railroad moves that the Court affirm the Judgment of the District Court on the ground that the question presented on appeal is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Where it is alleged that officials of a carrier by agreement used a corporation, International, to purchase assets of the carrier at a profit first to International and then to the officials, did those officials by virtue of such alleged agree-

ment have a substantial "interest" in International as that word is used in Section 10 of the Clayton Act?

ARGUMENT

Section 10 of the Clayton Act, 15 U.S.C. § 20, proscribes dealings between a carrier and another corporation where officials of the carrier in those dealings are at the same time officials of the corporation dealt with or have any substantial "interest" in that corporation. There is no allegation of joint offices here and no claim that the Railroad's personnel named in the Indictment have any stock or other conventional interest in International.

Directed by the Court to particularize what the substantial "interest" might be which if was claimed the individual defendants had in International Railway Equipment Corporation, the government responded:

> "The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

The Indictment had already identified the persons named in the Particulars as persons with high positions in the Boston and Maine: McGinnis—President and Director; Glacy and Benson—Vice Presidents. Para. 2. An Agreement, if proved, among certain of those officials with such positions in B&M to produce profits for International from dealings by it in B&M assets brought about by the intervention of those officials and pursuant to which they received

substantial money, would surely be enforceable in no court in the land. As is said in the leading case of *Guth* v. *Loft, Inc.*, 23 Del. Ch. 255, 5 A. 2d 503, 510 (1939), "Corporate officers and directors are not permitted to use their positions of trust and confidence to further their private interests." See also *Lazenby* v. *Henderson*, 241 Mass. 177, 180, 135 N.E. 302 (1922); Restatement, *Agency* § 387-98 (1958); cf. *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939). Thus, the "interest" of the individual defendants in International alleged is any extra-legal control over it they may have had by reason of their agreement with it to further an illegal objective. Such an "interest" is wholly unenforceable. Any such agreement would have conferred on the officials involved no *legal rights* in International at all.

On the basis of these particulars, adopting the language of the District Court, the question thus becomes whether the word "interest" in the statute includes "one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International". It is the position of this appellee, following the District Court, that the word "interest" refers here, as in common usage, to a legally enforceable *right;* that the individual defendants enjoyed no *rights* in International.

Where a violation of Section 10 of the Clayton Act is found, the carrier may be penalized by a twenty-five thousand dollar fine, the offending individuals by a five thousand dollar fine and jail sentences. Is it reasonable, assuming proof of the charges, to penalize a Railroad, its stockholders, and ultimately the public, because it has become the victim of an illegal scheme by its officials to divert Railroad assets to their personal benefit? Can it be doubted that an "understanding, agreement, relationship, arrangement and

concert of action" such as is referred to in the Particulars would necessarily be surreptitious, clandestine and held secret from the stockholders of the corporation and non-participating officers and directors? And if the "arrangement" is undisclosed and secret as suggested and therefore not within the Railroad's control or power to forestall, what is to be gained by adding the penalty of criminal sanctions to the carrier's losses accruing from the scheme? If the statute is to be construed to penalize a carrier for allegedly allowing itself to be victimized by the illegal, secret conspiracies of its officials, does such a construction not raise serious constitutional problems?

While there may well be devices to conceal the existence of stock holdings and directorships, there is certainly a difference in kind between legal interests so arising, and the ability to determine the existence of such interests, on the one hand, and, on the other, the secret and illegal type of "interest" alleged in the case at bar. In general, where a legal interest is involved, it will be discoverable and it may therefore be not unreasonable to impose policing functions on the carrier itself. On the other hand, where an illegal agreement to loot a carrier is involved, a requirement of internal policing is first of all unnecessary, since by definition the non-interested stockholders and directors will have the strongest motivation, quite apart from the statute, to uncover the illicit undertaking and bring it to a halt, and, secondly, profitless, because, as a practical matter, the carrier will not be able in such situations to act.

The government's contention that Section 10 of the Clayton Act reaches, as an "interest", the *sub-rosa* power decribed at bar is entirely novel. All the cases dealing with Section 10 speak in conventional terms of prohibiting interlocking directorates. Compare *Minneapolis & St. Louis Ry.* v. *United States*, 361 U.S. 173, 190 (1959) ("purpose . . . to prohibit . . . overreaching by . . . common directors") and

Beegle v. *Thomson*, 138 F. 2d 875, 880 (7th Cir. 1943) ("no liability unless such an interlocking director or agency relationship exists"). Neither the statute nor any case thereunder defines the meaning of the word "ifterest", as there used. The only reference in the legislative history that we can find to its meaning suggests that a stock holding was intended. Compare the minority report of Representative Nelson to an early draft of the legislation dealing only with interlocking directorates, complaining that ownership of stock might also produce interlocking control (H.R. Rep. 627 (on H. R. 15657), 63d Cong. 2d Sess. 8-9, Part 3 (May 6, 1914)), with later revisions (see Sen. Rep. No. 698 to H. R. 15657) and the enacted version. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), on which the government relies, actually looks the other way. The statute there involved, 18 U.S.C. § 434, prohibited self-dealing by a government agent "directly or indirectly interested in the pecuniary profits . . . of any corporation" doing business with the United States. This is definitely *not* the language of Section 10 of the Clayton Act. Compare, also, 49 U.S.C. § 20a(12).[1] If Congress had intended the result the government seeks, this is the type of language it would have used. But, it didn't.

The government would justify its construction on the ground that any financial relationship of a railroad official with a firm leading him to favor the firm to the detriment of the railroad is undesirable. This may be so. There is no indication, however, that the activities and relationships

[1] Here is a statute which specifically prohibits a carrier official from receiving "for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation . . . of any securities issued . . . by such carrier." Securities include any evidence of indebtedness. 49 U.S.C. § 20a(2). Thus, when Congress has wished to reach conduct such as is alleged in the Particulars, it has done so in clear and unmistakeable terms.

alleged, if proved, would be outside the reach of state criminal and civil sanctions. Moreover, Count 2 of the Indictment, based on the same factual situation as Court 1,[2] still stands and the individual defendants will presumably be tried on that Count. There is no occasion, therefore, for this Court to legislate an expansion of the statute for fear that the alleged activities of the individuals would otherwise be countenanced.

No citation of authority is necessary for the proposition that penal statutes are to be strictly construed. Nor is it necessary extensively to document the common meaning of "interest" as a "right in the nature of property". Black's Law Dictionary, "Interest" (3d Ed.); see Webster's New International Dictionary "Interest", 1 (2d Ed.). The word "interest", unless the text otherwise requires, connotes a legal right, a legal interest. In affirming that the word did not embrace a concern arising out of an "illegal and illicit plan", the District Court merely gave effect to the common meaning of the word. The arguments of policy the government now advances in its Jurisdictional Statement should be addressed to the Congress. As the statute now stands, any contention that the "understanding" referred to in the Particulars created an "interest" of the individual defendants in International is unsubstantial and without merit.

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[2] That Counts 1 and 2 reflect different theories of criminal liability arising from the same set of facts is plain from a reading of the two counts, together with all the Particulars. The Government's Jurisdictional Statement, in footnote 5 (page 14) to the words "substantial monies", found in the Particulars to Count 1, says "The actual operation of this scheme, so far as it involved the sale of the ten cars involved in this case, is set forth in Count II of the Indictment."

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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July, 1964

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 232 of 1964.

UNITED STATES OF AMERICA,
Appellant,

v.

BOSTON AND MAINE RAILROAD ET ALS.,
Appellees.

MOTION OF THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON TO AFFIRM.

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UNITED STATES OF AMERICA,
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BOSTON AND MAINE RAILROAD ET ALS.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION OF THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON TO AFFIRM.

The appellees Patrick B. McGinnis, George F. Glacy and Daniel A. Benson, pursuant to Rules 16(1)(c) and 35 of the Revised Rules of this Court, move that the order of the District Court of December 3, 1963, dismissing count I of the indictment, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinion Below.

This is an appeal from an order of the District Court for the District of Massachusetts, dated December 3, 1963, dismissing count I of a two-count indictment against the Boston and Maine Railroad and three of its present or former officers or directors, charging violation of §10 of the Clayton Act, October 15, 1914, c. 323, §10, 38 Stat. 734 (15 U.S.C. §20).

The opinion of the District Court, by Sweeney, Chief Judge, allowing motions of the Railroad and the three individual defendants charged in this count, is printed in the Appellant's Jurisdictional Statement at pages 17 and 18. See *United States* v. *Boston & Maine R.R.*, 225 F. Supp. 577.

Question Presented.

The indictment charges that the Railroad, when its president and director, McGinnis, and its selling officer in the particular transaction, Glacy, "had a substantial interest in such other corporation," referring to International Railway Equipment Corporation, sold to said corporation, without competitive bidding, eight stainless steel passenger cars and two stainless steel combination baggage coaches; and that McGinnis knowingly voted for, and McGinnis, and Glacy and Benson, both vice-presidents, knowingly directed the act "and aided and abetted in said violation."

The indictment did not define the "substantial interest" which it alleged McGinnis and Glacy had in the purchasing corporation. In compliance with an order for particulars, the Government defined the situation, however, in the following terms:

> "The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an

understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

The question presented* by this motion is whether §10 of the Clayton Act, quoted below, applied to dealings between a common carrier and another corporation where—

(*a*) there are no interlocking directorates or officers between the carrier and the other corporation, and

(*b*) the only relationship alleged is an "understanding" among certain officers and directors of the carrier and the other corporation that the former would receive personal profits from such dealings.

---

*The question presented is narrowed under 18 U.S.C. §3731 to the issue of statutory interpretation. Although the defendants also moved, at an earlier stage of the proceedings, to dismiss count I as deficient in other respects, see *United States* v. *Boston & Maine R.R.*, 1963 Trade Cases, ¶70,913 (D. Mass. 1963), the statute conferring the right of the Government to appeal from the dismissal of count I "contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides." *United States* v. *Keitel*, 211 U.S. 370, 398 (1908). Such issues as the adequacy of the vague language of count I, irrespective of the bill of particulars, under *Russell* v. *United States*, 369 U.S. 749 (1962), are accordingly not before the Court. See also *United States* v. *Stevenson*, 215 U.S. 190, 195-196 (1909); *United States* v. *Hvass*, 355 U.S. 570, 574 (1958). In *United States* v. *Borden Co.*, 308 U.S. 188, 193 (1939), the Court noted that "this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment."

Statute Involved.

The statute, §10 of the Clayton Act (Act of October 15, 1914, c. 323, §10, 38 Stat. 734, 15 U.S.C. §20) provides:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.
>
> "Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

"Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

"If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court."

Reasons for Granting the Motion to Affirm.

The District Court's decision is plainly right and should be affirmed. The clear language of §10, and the context of the language, permit no other conclusion than that reached below, and the legislative history confirms this result.

1. Statutory context: the antitrust laws.

At the outset, the statutory context of §10 should be noted. It is a part of the antitrust laws. §1 of the Clayton

Act specifically so provides. 15 U.S.C. §12. This Court observed that §10 "is, of course, an antitrust law" in *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U.S. 173, 190 (1959).

The statute prohibits in three extended paragraphs certain activities by carriers in the absence of bidding, and then in the fourth paragraph provides sanctions against the carrier and those who "knowingly voted for or directed" the prohibited activity or "aided or abetted in such violation." The thrust of §10 is thus against the railroad in the first instance, and its design presumably is to prevent only transactions whose impropriety the railroad should be able to control. Bidding regulations which the carrier must follow, when the statute applies, are contained in 49 C.F.R. Part 8.

Consistently with such a design, §10 prohibits transactions involving either (*a*) a common officer or director or (*b*) ownership by the carrier's officer or director of a substantial interest in the other corporation, partnership, firm or association.

2. The plain language of §10.

Do the particulars before the Court allege that McGinnis and Glacy had an interest in International? Obviously not. An agreement or understanding, of the nature referred to in the particulars, would not create at law or in equity an interest in a *corporation*. Far less could McGinnis or Glacy under such an arrangement, if proved, be in control of International or have any right to elect an officer or director of International.

Ordinary usage does not permit "interest in a corporation" to include the kind of relation here involved. A bequest of all the testator's interest in a corporation does

not include a corporate debt to the testator. *Major* v. *Major*, 106 Ind. App. 90, 96, 15 N.E. 2d 754 (1938):

> "Generally speaking, an indebtedness due from a corporation to another, even though the person to whom the debt is owing be a stockholder of the corporation, does not, because of the debt, confer upon the person to whom it is payable an interest in the corporation. It is not so generally understood. A creditor's right is superior to that of a stockholder, but he has no right because of this relationship to any voice in the management or control of the corporation, or no interest therein within the meaning of that word in accordance with its ordinary usage."

See also *Johnson* v. *Goss*, 128 Mass. 433, 436-437 (1880).

The words in the critical phrase should be construed together—"has any substantial interest in, such other corporation"—and the word "has" is important. It could not be said that the arrangement described in the particulars is susceptible of ownership.

Webster gives indeed the following description of the word "have":

> "HAVE is the general term for any relation of belonging or of being controlled, kept, regarded, or experienced as one's own . . ."

Webster's Seventh New Collegiate Dictionary, p. 381. The particulars do not indicate that there was "any relation of belonging" between McGinnis and Glacy on the one hand and International on the other. International was not "controlled" by either of them. There is no substantial basis in the particulars to infer that International was "kept, regarded, or experienced" by either of them "as [his] own."

3. Contrasting statutory provisions.

The interpretation placed on §10 by the District Court is supported by the circumstance that other statutes deal with related problems in a contrasting manner.

An important such provision is §20a of the Interstate Commerce Act, as added February 28, 1920, c. 91, §439, 41 Stat. 494, 49 U.S.C. §20a. Subsection (12) of §20a provides in material part:

> ". . . It shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account."

§20a is different from §10 of the Clayton Act in the following respects: (*a*) it appropriately is directed at the director or officer, not the carrier, and (*b*) it deals with the problem of the officer's or director's sharing in the proceeds, which is wider in application than §10, which prohibits only conflicting interests in the corporate entity.

The Interstate Commerce Commission has observed the difference in the two sections. Rejecting the argument that §20a in the field of carrier securities was a partial repeal of §10, the Commission placed emphasis upon—

> "the inclusion in the former section of paragraph (12) which has the same underlying theme as section 10 but goes a step further in forbidding an officer or director to share in any degree in profits from the hypothecation or sale of securities."

Columbia Terminals Co., 40 M.C.C. 288, 293 (1945). What the Government asks is that the Court go the same "step further" with respect to carrier equipment and supplies as Congress did with respect to securities in adopting §20a.*

Outside the context of carriers, an example of a prohibition of conflicting interests in proceeds was recently before this Court. 18 U.S.C. §434, re-enacted from earlier versions in Act of June 25, 1948, c. 645, 62 Stat. 703, prohibits government employees from acting where they are "directly or indirectly interested in the pecuniary *profits or contracts* of any corporation," etc.† (Our emphasis.) Such language might be appropriate to regulate the conduct of individuals. It would not be appropriate as an antitrust regulation applicable primarily to railroad corporations, and it is significant that Congress did not use such conflict-of-interest terminology.

18 U.S.C. §434 was construed accordingly in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), to include the situation of a "dollar a year" governmental employee who had an indirect interest in the profits his private employer would in all likelihood realize from the transaction in which the employee participated on behalf of the government. The opinion of the Court makes

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*Another statute involving carriers which should be noted is 18 U.S.C. §660. The present indictment contains a second count based on §660. Among other things, that section prohibits officials of a carrier from abstraction or misapplication of its property or assets. (See Act of June 25, 1948, c. 645, 62 Stat. 730.)

†The full statute reads as follows: "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

it quite clear that the employee's interest was in the "profits or contracts" and that the statute was intended to proscribe a wide varie / of cases of divided loyalty. "We think that the findings of the lower court demonstrate that, at the very least, Wenzell had an indirect interest in the contract which the sponsors were attempting to obtain." 364 U.S. at 555.*

4. The legislative history of §10.

The legislative background of §10 need not be extensively reviewed in view of the simplicity of the terms of the statute. It is worthy of note, however, that the legislative history of the critical language would require the result reached by the District Court even if the language had been ambiguous. The Congressional reports and debates turn on the concept of control.

The Clayton Act derived from H.R. 15657 of 1914, 63d Congress, Second Session. House Report No. 627, dated May 6, 1914, contains the bill as it was reported by the House Judiciary Committee with a favorable recommendation of passage. §9 of the bill dealt with interlocking directorates. It prohibited, in terms in several respects different from the ultimately enacted language, officers and directors in common between carriers and those who sold equipment to carriers. It had no reference to any other relationship, such as common control. At pp. 17-18 of the Report it was noted that §9 was intended to prevent interlocking directorates:

*In dealing with §10 as a conflict-of-interest statute, the Government's jurisdictional statement in this case is in error. Nowhere does the Government seem to recognize that §10 applies primarily to railroad corporations and not their employees. Nor does the statement even focus on the fact that §10 speaks in terms of interest in the other corporation and not in terms of interest in the transaction itself.

"The provisions of this paragraph prevent absolutely common directors or interlocking directors between corporations occupying relations to each other described therein, without any reference to the capital, surplus, and undivided profits of the corporations dealing with each other."

The concept of an "interest" which the carrier's director or officer "has" followed an objection, in a minority report by Representative Nelson, appearing in Report No. 627, Part 3, at pp. 8-9. Nelson pointed out that, while the language of the Committee's original draft might bar a common directorate, the "other corporation" could nevertheless be owned and controlled by the railroad's director or officer under the draft bill.

"Dealings between two corporations in each of which the same men have a controlling interest are likely to result in the robbery of the minority stockholders. Such transactions should be prohibited, no matter how the interlocking control may have been secured . . . [Under the draft,] they may own all the stock of such other companies."

The bill reported by the Senate Judiciary Committee on July 22, 1914, was accordingly redrawn as to §9. Senate Report No. 698. It required bidding whenever the carrier had on its board or as its president, manager or purchasing agent "any person who is at the same time an officer, director, manager, or general agent of, or who has any direct or indirect interest in" the other corporation, firm, partnership or association. The final language in the section, renumbered as §10, replaced "direct or indirect interest" with "substantial interest."

This sequence confirms what Congress intended by its plain language. Transactions in amount more than $50,000 in any one year had to be bid if the carrier had a common officer or director or if one of its own officers or directors owned a substantial interest in the other corporation. Nothing in the minority report that preceded the final draft of legislation suggested that Congress had anything more in mind.

It is historically important to realize that the original bill in H.R. 15657 had outlawed *interlocking directorates* but not stock control. The original prohibition would have been ridiculously easy to get around. The carrier's officer or director would not elect himself as the officer or director of the other corporation, but would elect his son, his agent or his lawyer. The only way in which this could be prevented was to modify the language in the natural and obvious way. The prohibition should apply, not only where there was actually a common officer or director, but also where the carrier's officer or director owned a sufficient interest to elect a relative or representative to an office or the board of the other entity.

As Senator Chilton, being one of the sponsors of the bill in the Senate, put it on September 30, 1914, under the original bill "you could have your son, your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board yourself." 51 Cong. Rec. 15943. For this reason, ownership of a substantial interest was placed on precisely the same footing as a common officership or directorate.

The only case which we have found interpreting the relevant words of §10 supports our view. In *Beegle* v. *Thomson*, 138 F. 2d 875 (7th Cir. 1943), it was charged in a civil antitrust action that the defendant by using its large volume of freight haul as a club to coerce purchases of anti-splitting

irons from itself had compelled the Pennsylvania Railroad to purchase irons exclusively from the defendant. It was held that no violation of §10 was shown. "The statute creates no liability unless such an interlocking director or agency relationship exists." 138 F. 2d, at 880.

5. Strict construction.

In view of the simple and unambiguous language of §10, which is supported by the legislative history, it may not be necessary to resort to rules of construction. If there were any ambiguity, however, it would be resolved in favor of the defendants.

The familiar rule of construction is that penal statutes are to be strictly construed. As early as 1820 this Court gave the principle a classic formulation. The opinion pointed out that "The rule that penal laws are to be construed strictly, is, perhaps not much less old than construction itself." *United States* v. *Wiltberger,* 5 Wheat. 76, 95-96. The general view set forth in that opinion is that the legislative intention must be gathered from the language employed, not from other language that might have been employed. If the language does not cover the act complained of, there is no reason to extend the statute. There are many subsequent cases on the general doctrine. E.g., *United States* v. *Hartwell,* 6 Wall. 385 (1867); *United States* v. *Noveck,* 271 U.S. 201, 204 (1926); *United States* v. *Raynor,* 302 U.S. 540, 552 (1937); and *Smith* v. *United States,* 360 U.S. 1, 9 (1959).

Conclusion.

For the reasons stated, the motion of the individual defendants to affirm the judgment below should be granted

because no substantial question is presented by the appellant for decision of this Court.

Respectfully submitted,

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CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 232

UNITED STATES OF AMERICA, APPELLANT

v.

BOSTON AND MAINE RAILROAD, PATRICK B. MCGINNIS, GEORGE F. GLACY, AND DANIEL A. BENSON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the district court (R. 30–31) is reported at 225 F. Supp. 577.

JURISDICTION

The decision of the district court dismissing Count I of the indictment was rendered on December 3, 1963 (R. 30–31). On January 2, 1964, the United States filed a notice of appeal, and this Court noted probable jurisdiction on October 12, 1964 (R. 39). Since the district court's order dismissing Count I was based solely upon the court's construction of section 10 of the Clayton Act, this Court has jurisdiction to review

that order on direct appeal under the Criminal Appeals Act, 18 U.S.C. 3731.

QUESTION PRESENTED

Section 10 of the Clayton Act prohibits a common carrier with officers who have "any substantial interest in" another corporation from having commercial dealings with that corporation in an amount exceeding $50,000 annually, except on the basis of competitive bidding. The question presented is whether officials of a carrier who entered into an agreement and understanding with another firm under which they (1) arranged to assist the other firm in profiting from dealings in property acquired from the carrier without competitive bidding and (2) were to and did receive a substantial share of the other firm's resulting profits, had a "substantial interest" in such firm.

STATUTE INVOLVED

Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 20, provides in pertinent part:

> No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager,

or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. * * *

* * * * *

If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

STATEMENT

Count I of a two-count indictment (R. 8–13), returned on August 13, 1963, charged the Boston and Maine Railroad (the "B & M") and three of its officers (Patrick B. McGinnis, President and Director; George F. Glacy, Vice President; and Daniel A. Benson, Vice President) with violating Section 10 of the Clayton Act. That section requires that dealings between an interstate common carrier and another corporation in the amount of more than $50,000 in any one year be conducted by competitive bidding "when the said common carrier shall have upon its board of

directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has *any substantial interest in*, such other corporation * * * (emphasis added)."

Count I charges (R. 8–10) that, without competitive bidding, the B & M sold 8 stainless steel passenger coaches and 2 stainless steel combination baggage coaches valued in excess of $50,000 to the International Railway Equipment Corporation ("International"), and that the B & M "had upon its board of directors and as its president a person, and had as its selling officer and as its agent in the particular transaction a person, who at the same time had a substantial interest in" International. McGinnis, Glacy and Benson were named as defendants under the provision of Section 10 that makes every "director, agent, manager, or officer * * * who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation * * *" guilty of a misdemeanor.[1]

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[1] Count II of the indictment is based upon the same transaction as Count I, and charges defendants McGinnis, Glacy, Benson, International and Henry Mersey, President of International, with violating 18 U.S.C. 660. That section provides:

> Whoever, being a president, director, officer, or manager of * * * [a] corporation engaged in commerce as a common carrier, * * * embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets * * * or willfully or knowingly converts the same to his

The government filed a bill of particulars which stated that the substantial interest that McGinnis and Glacy had in International was an "understanding, agreement * * * and concert of action among the said defendants McGinnis, Glacy and International, and others, for * * * the purpose of producing profits for

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own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

* * *

Count II alleges as follows (R. 10–13): About April 30, 1958, Waldo E. Bugbee, a dealer in used railroad equipment, attempted to obtain from B & M Vice President Glacy an option to purchase 10 B & M coaches then in service at a suggested purchase price of $500,000 for resale to an undisclosed third party. Glacy refused to grant the option, and McGinnis and Glacy instructed B & M officials that no direct dealings should be had with Bugbee, and that Mersey, President of International, would handle the sale of B & M's coaches. Mersey then contacted Bugbee and indicated that he, Mersey, had the right to sell the B & M equipment. Mersey negotiated the sale to Bugbee's client, the Wabash Railroad, and at no time purported to act as an agent or broker for the B & M.

Upon the recommendation of Benson and Glacy, the B & M board of directors, with the concurring vote of McGinnis, directed that the 10 coaches be withdrawn from service and sold. Under the direction of the individual defendants, the coaches were sold on August 14, 1958, to International for $250.000, which was paid by a check post-dated to August 22, 1958. On August 15, 1958, one day later, International resold the coaches to a Wabash subsidiary for $425,000. Within a short time after the transfer of the equipment, International paid McGinnis $35,000, Glacy $25,000 and Benson $11,500 from funds that were derived almost entirely from the proceeds of International's resale of the coaches to the Wabash.

The indictment also alleges that between July 1, 1958, and June 30, 1959, International's gross sales, which amounted to approximately $480,000, consisted almost exclusively of the resale of equipment acquired from B & M (R. 10).

International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies" (R. 24–25). All defendants moved to dismiss Count I, upon the ground that the indictment, as amplified by the bill of particulars, did not allege facts sufficient to constitute an offense under Section 10.

On December 3, 1963, the court granted the motions to dismiss "on the basis of my construction of the statute." The court ruled that "the words 'any substantial interest' as used in the statute do not cover a situation such as here presented. The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International" (R. 30–31).

ARGUMENT

APPELLEES VIOLATED SECTION 10 OF THE CLAYTON ACT BY SELLING THE CARRIER'S PROPERTY WITHOUT COMPETITIVE BIDDING TO A CORPORATION IN WHICH THE CARRIER'S OFFICERS AND DIRECTORS HAD A SUBSTANTIAL INTEREST

INTRODUCTION AND SUMMARY

Section 10 of the Clayton Act prohibits a common carrier from engaging in more than $50,000 worth of annual "dealings in * * * supplies, or other articles

of commerce * * * with another corporation * * * when the said common carrier shall have upon its board of directors or as its president * * * or as its * * * selling officer * * * any person * * * who has any substantial interest in such other corporation" unless the dealings are conducted through competitive bids. The history of the statute confirms what its language plainly states: that it is intended to prevent the officials of a carrier from causing it to deal on unfavorable terms with another firm in whose profits the carrier's officials expect to share. This is precisely what the district court found was the nature of the scheme described in the indictment: "an illegal and illicit plan to siphon off for [the individual appellees'] personal benefit property of the Boston and Maine Railroad through the medium of International" (R. 31).

Boston and Maine's president and director, McGinnis, and its vice president, Glacy, arranged to assist International in making profits from dealings in property of the Boston and Maine in exchange for a part of the profits to be made from the resale of that equipment. We contend that an arrangement under which a carrier's officers are to share in another firm's profits derived from resale of property bought from the carrier gives the officers a "substantial interest" in that other firm within the meaning of Section 10. The statute was intended to require competitive bidding wherever carrier officials have any conflicting interest in a firm dealing with the carrier substantial enough to cause them to favor that firm to the detriment of

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the carrier. An interest in a purchaser's profits from resale of carrier property is obviously such a conflicting interest. The interests of McGinnis and Glacy in International thus fall squarely within the coverage of the Act.

A. OFFICERS OF THE BOSTON AND MAINE WERE TO RECEIVE PART OF THE PROFITS MADE BY INTERNATIONAL THROUGH ITS DEALINGS IN PROPERTY ACQUIRED FROM THE CARRIER.

The government's indictment and bill of particulars charge that the Boston and Maine's president and director, McGinnis, and its vice president and selling officer, Glacy, had substantial interests in International's profits from its dealings in property acquired from the carrier. They had entered into an arrangement with International for "the purpose of producing profits for International from dealings by it in property acquired from the B & M" through their assistance (R. 25). Pursuant to this arrangement for producing profits for International, McGinnis and Glacy were to receive substantial sums (R. 25), *i.e.*, they were to share in or receive part of the profits which the arrangement was intended to create for International on resale of the property. As the district court found, the scheme was to benefit them "through the medium of International" (R. 31).[2]

The allegations of Count II of the indictment, charging a different violation arising out of the same

[2] International was, indeed, little more than a shell at the time. It made the $250,000 purchase with a post-dated check which it covered by the proceeds of the immediate resale (R. 12). Its entire business for the year consisted "almost exclusively" of reselling B & M equipment, and the sale of the 10 coaches involved herein accounted for $425,000 of its $480,000 total sales (R. 10).

transaction, spell out the details of the transaction and show clearly that McGinnis and Glacy were to share in the profits which they had agreed to help International make. They were instrumental in selling the carrier's cars to International at a price of $250,000, although they knew of an opportunity for sale to a third party at twice that price (R. 11–12). They saw to it that the Boston and Maine did not sell the cars to anyone except International, and referred International's president to the agent of the ultimate purchaser (R. 11–12). International sold the cars for $425,000 the day after buying them from the Boston and Maine for $250,000, a sum which it had paid with a post-dated check (R. 12). Shortly after the sale and resale of the ten railroad cars, McGinnis received $35,000 or one-fifth of the $175,000 overall profit on resale; Glacy received $25,000 or one-seventh of the profit (R. 12).[3] These sums "were derived almost entirely out of the proceeds from the resale by International of the said 10 coaches" (R. 12).

In short, in exchange for part of International's profits, McGinnis and Glacy agreed to and did participate with International in the entire course—both purchase and resale—of its transactions in cars acquired from the Boston and Maine. Their claim to a substantial share in International's profits from dealings in property acquired from the carrier created a real interest in International, comparable to the interest of a shareholder or partner of that firm, and greater than the interest a carrier official would have in a

[3] Benson, also a vice president of the carrier received $11,500 (R. 12).

company which paid him a cash bribe for favoring it in its dealings with the carrier. Here, McGinnis and Glacy shared in and, indeed, depended upon the profits they and International together could make from dealings in property acquired from the carrier without competitive bidding. If International did not profit, they might receive nothing; International's welfare was their welfare. They were not simply the recipients of illegal cash payments for selling carrier property at a low price to a firm in which they had no continuing interest.

B. A CLAIM TO RECEIVE PART OF THE PROFITS A CORPORATION REALIZES FROM DEALINGS IN PROPERTY ACQUIRED FROM A CARRIER IS A "SUBSTANTIAL INTEREST IN" THAT CORPORATION WITHIN THE MEANING OF SECTION 10 OF THE CLAYTON ACT.

1. *The language of the statute*

The language of Section 10 of the Clayton Act was carefully chosen to protect the nation's common carriers from the economic injury they might suffer if substantial purchases and sales were made, without competitive bidding, between the carriers and firms in which the carriers' officers and directors had significant conflicting interests.[4] The federal policy has three aspects: (1) protecting the strength of the national transportation system; (2) maintaining the

[4] In discussing a situation where the carrier was a purchaser, rather than a seller as in the present case, this Court stated: "The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest." *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 190.

integrity of the assets and accounts upon which rate regulation rests; (3) preserving the system of free and fair competition among industries dealing with carriers. To these ends, the statute condemns specific categories of dual relationships which create a conflict of interest on the part of carrier officials sufficiently serious that they might favor another firm at the expense of the carrier, *i.e.*, where the carrier's (a) director, (b) president, (c) manager, (d) purchasing or selling officer, or (e) agent in the particular transaction is a (1) director, (2) manager, or (3) purchasing or selling officer of the firm with which the carrier is dealing. In addition, the act has a fourth general category of proscribed relationships—where the carrier's official or director "has any substantial interest in" such other firm.

The latter broad phrase—"any substantial interest in" such other firm—is obviously intended to cover any other form of dual relationship which, like the categories specifically enumerated, might cause the carrier's official to favor a firm dealing with the carrier to the detriment of the carrier. The language covers any practical or pecuniary interest in the profits of another firm substantial enough to give rise to the divided loyalties that result from having a "conflict of interest."[5] It might be argued that receipt of a cash

[5] In *Securities and Exchange Commission* v. *Dumaine*, 218 F. 2d 308 (C.A. 1), the court interpreted an SEC regulation providing that no securities of a public utility holding company in reorganization should be bought or sold in any transaction in which any person connected with a committee of holders of the company's securities had "any beneficial interest, direct or indirect." The court held that that phrase included "every property or contract right, legal or equitable, in securities traded by any one of the persons specified in the Rule. But we do not

bribe for favoring another firm in its dealing with a carrier does not create a sufficiently continuing interest in that other firm, for the other firm's success or failure in its dealing might remain a matter of relative indifference to the recipient of the bribe. But a claim to a part of the profits a corporation realizes from resale of property acquired from the carrier is plainly a "substantial interest" in the purchasing corporation, giving the carrier official a highly significant stake in its profits and welfare. Like its shareholders, he will profit if the purchasing corporation profits from its dealings. Unlike its shareholders, he has no vote in the selection of its officers, and he expects to share in the profits from limited dealings rather than the totality of its operations—but these differences are irrelevant in the context of the

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think that the Rule must necessarily be construed as limited in its reference to recognized legal or equitable rights" (218 F. 2d 315). Recognizing that the purpose of the rule was to assure that committee members should serve but one master, the court held that the prohibition covered trading in securities by the wife of a committee member.

See also *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, where an agent of the United States was held to have violated the federal conflict of interest statute because of a possibility that a contract might be made with a corporation of which he was an officer. In *Tuscan* v. *Smith*, 130 Maine 36, 153 Atl. 289, and *Cordingley* v. *Borough of Mendham*, 12 N.J. Misc. 331, 171 Atl. 158, a creditor's interest was held covered by a municipal conflict of interest statute. See, *contra*, *Morrow* v. *Strickler*, 259 Pa. 60, 102 Atl. 282; *Wilson* v. *New Castle*, 301 Pa. 358, 152 Atl. 102. And in *Adams* v. *United States*, 302 F. 2d 307 (C.A. 5), a personal, non-financial interest in the outcome of a case was held sufficient to disqualify a judge.

statute, for none lessens his conflicting interest in the profits of the purchasing corporation.

Of even greater importance to the purposes of Section 10, a carrier official with this interest in another corporation is, realistically, a representative of that corporation for purposes of its dealings with the carrier. The present case is illustrative. Short of 100 percent ownership of International, it is difficult to conceive of a scheme better calculated to create in the carrier's officers a substantial conflicting interest in International's profits from dealing with the carrier. Ownership of even substantial amounts of International's stock—unquestionably covered by the statute—might still leave McGinnis and Glacy with interests in that corporation too diluted to assure their primary loyalty to International, rather than to the Boston and Maine, in dealings between the two. The interest in International resulting from being a salaried "director, manager, or purchasing or selling officer" of that corporation would be far less immediate and substantial. The instant arrangement to benefit from the profits of International's dealings in Boston and Maine property made the individual appellees' interest in International's gain from any transaction with the carrier directly dependent upon the extent of their departure from their fiduciary obligation: the greater the harm to the carrier from an inadequate sales price, the more certain and greater the profits to International of which they would receive a substantial part.

That McGinnis and Glacy had the type of conflicting interest which the statute condemns is, finally,

established by a comparison of the arrangement they employed to another practically identical form of interest which the statute indisputably reaches. Had they entered into a partnership with an unincorporated firm or with Mersey as an individual to conduct the very dealings in property acquired from the Boston and Maine which are here alleged, their claim to a part of the profits would indisputably constitute a "substantial interest in such * * * partnership." The result should not be different because the "arrangement" was with a corporation.

The plain meaning of the words "any substantial interest" in the context of a statute dealing with conflicting relationships of carrier officials dictates the conclusion that Section 10 requires competitive bidding where the carrier officials have a claim to part of another corporation's profits from dealings in property acquired from the carrier. Since Congress was dealing with recognized acts of abuse of position—in light of traditional concepts of fiduciary duty—statutory language which parallels established rules of fiduciary duty should be given its full effect. *Cf.*, *Burton* v. *United States*, 202 U.S. 344.[6] The statute merely requires competitive bidding under

[6] Fiduciaries have always been forbidden "to occupy a position which [would] conflict with the interest of parties they represent, and are bound to protect. They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act and then personally participate in the benefits." *Wardell* v. *Union Pacific R. Co.*, 103 U.S. 651, 658; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 599; *Corsicana Nat'l Bank* v. *Johnson*, 251 U.S. 68; *Pepper* v. *Addicks*, 153 Fed. 383, 405 (E.D. Pa.).

penal sanctions in situations where the most rudimentary concepts of honest dealing would otherwise be violated. To that end it provides that officers, directors, and agents of interstate common carriers must use competitive bidding when selling carrier property to a company in which they have any interest, whatever its nature, whenever it is "substantial."[7] This very plainly includes what may be the most serious form of conflicting interest in another company, an interest in the purchaser's profits from dealings in property acquired from the carrier.

2. The legislative history

The background, legislative history, and contemporary interpretation of Section 10 of the Clayton Act confirm the plain meaning and obvious purpose of its words: that it was intended to forbid officers and directors of a common carrier from dealing privately with other corporations *wherever* the officers and directors have substantial, conflicting interests on both sides of the transaction. As stated by a Congressman at the time the Act was passed, Section 10 was meant to prevent "conspiracies on the part of the officers of railroads and supply companies to loot the treasuries of the railroads, thereby crippling the arteries of commerce for their personal aggrandizement" (Congressman Fitzhenry, 51 Cong. Rec. Appendix, p. 1181).

[7] Neither congressional purpose nor plain language permits reading "'any substantial interest" as "any [then present legal and] substantial interest," as the court below did (R. 31), thereby excluding a future contingent interest, an illegal interest, and an equitable interest.

(a) Congress was aware of two separate harms resulting from the widespread practice of corporate officers and directors having interests in several corporations. Prior to becoming a Justice of this Court and shortly before passage of the Clayton Act, Louis D. Brandeis stated both harms in classic form. In *Other People's Money* (1914), pp. 51–52, he pointed out that:

> The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters * * *.
>
> The term "Interlocking directorates" is here used in a broad sense as including all intertwined conflicting interests, whatever the form, and by whatever device effected. The objection extends alike to contracts of a corporation whether with one of its directors individually, or with a firm of which he is a member, or with another corporation in which he is interested as an officer or director or stockholder. * * *

The harm to competition resulting from interlocking directorates among supposedly competing corporations had been revealed by such investigations as those of the Pujo Committee.[8] It was dealt with by Section 8 of the Clayton Act, which flatly prohibits any person from being a director in certain competing corporations if one has capital in excess of one million

[8] *Money Trust Investigation. Investigation of Financial and Monetary Conditions in the United States under House Resolution Nos. 429 and 504 before a Subcommittee of the Committee on Banking and Currency*, 62d Cong.

dollars, "other than banks, banking associations, trust companies and common carriers." Bank directors, officers, and employees were also prohibited from holding interlocking positions under specifically described circumstances.

Section 10 of the Clayton Act was primarily intended to deal with a different harm.[9] As applied to corporations in a buyer-seller relationship, the primary evil of "interlocking directorates," in the broad sense in which Brandeis used this term, was the violation of fiduciary duties. The resulting loss to corporations was of public concern where common carriers were victimized. Striking examples in the era just prior to the passage of the Clayton Act involved the financial collapse of the once prosperous New York, New Haven & Hartford Railroad and the Northern Pacific Railroad. Serious injury to other railroads had also resulted. See, *e.g.*, 51 Cong. Rec. 9185, 9261, 15942–15944, 16271. The report of the Interstate Commerce Commission on the collapse of the New Haven demonstrated that the problem of divided interests was not limited to interlocking directorates and multiple shareholdings. The New Haven, for example, had purchased some $37,000,000 worth of cars from James B. Brady who had made substantial gifts to the officials with whom he dealt. *In re Financial Transactions of the New York, New Haven & Hartford Railroad Co.*, 31 I.C.C. 32, 61; S. Docs. 544 and 543, 63d Cong., 2d Sess.

Senator Nelson described another form of the then-prevalent abuses with which Section 10 was con-

[9] The 1914 Act did not prohibit interlocking directorates among rival railroads. This step was taken in 1920. 41 Stat. 494, 49 U.S.C. 20a(12).

cerned: "[O]ne of the evils railroad companies have been suffering from for years has been the fact that their officials and directors have organized and maintained what you might call supply companies—companies that are manufacturing machinery, equipments, and other things for the use of the railroad, and doing construction work for them—and in order that it might prove mutually profitable generally the leading officers and managers and the leading manipulators of the railroad companies were connected with these companies, which I, for short, shall call supply companies, furnishing supplies to the railroad companies. In every case where supplies were bought from these concerns the buyer and the seller were the same" (51 Cong. Rec. 15942).[10]

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[10] As early as 1873 Congress had sought to enable the Attorney General to recover some of the wasted properties of the Union Pacific Railroad Company. This Court described the action which the Attorney General subsequently brought in *United States* v. *Union Pacific Railroad Co.*, 98 U.S. 569, 609–610, as follows:

> The substance of the charge is, that the board of directors of the railroad company made contracts for building the road, and for running the Pullman cars on it, and for mining its coal lands and purchasing the coal so mined, which were a fraud upon the company; that these contracts allowed exorbitant prices for work done and material furnished; that otherwise they were very advantageous to the other contracting parties and injurious to the company; that in all of them the directors, or a controlling majority of them, were interested adversely to the company; that in fact they were, in the name of the company, making contracts with themselves as the other party. In short, it may be taken for granted that if these allegations are true, as they must be held to be on demurrer, frauds more unmitigated than those set forth in this bill were never perpetrated on a helpless corporation by its managing directors.

(b) President Wilson's message to the Congress of January 20, 1914, dealing with the subject of "trusts," laid down the broad outline of what later became the Clayton Act (51 Cong. Rec. 1962–1964). The purpose of the new legislation was basically "to give expression to the best business judgment of America, to what we know to be the business conscience and honor of the land." In the course of his message, the President noted the need "for laws which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business."

In support of the President's purpose to solve the problem of corporate officials dealing with themselves in different capacities, Section 9 of the House bill (the predecessor of Section 10) flatly prohibited any person "who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation" that sells to or provides construction or maintenance services to a common carrier from acting as a "director or other officer or employee of [the] carrier."[11]

The Senate made two major changes in the House bill. First, it decided that the problem of securing

[11] See H.R. 15657, as it passed the House. S. Doc. 584, 63d Cong., 2d Sess., p. 10.

honest dealings could best be resolved, not by prohibiting office-holding, which might be too inflexible in emergency situations, but by requiring competitive bidding.[12] The Senate Committee Report noted that the "prime object" of the House provision was (S. Rep. 698, 63d Cong., 2d Sess., pp. 47–48):

> to prevent common or interlocking directors in corporations which occupy the relations to each other which are thus described; and is mainly intended to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers, often being practically both seller and purchaser * * *.

The harms of such dual relationships could be prevented by requiring the carrier to use competitive bidding where they were present, although the seemingly anomalous result of imposing the primary obligation upon the carrier was to subject it to penalties for acts of its officers or directors which were intended to victimize the carrier.[13]

The second major change made by the Senate was to close the gaping loophole left by a bill which for-

[12] S. Rep. 698, 63d Cong., 2d Sess., p. 47.

[13] Appellee Boston and Maine urged in its Motion to Affirm that the statute should not be applied to a secret arrangement such as that alleged because of the resulting unfairness to the carrier. But the statute plainly imposes an absolute liability on the carrier, although it is typically the unknowing victim of the harms proscribed by the statute. The carrier can never know of its officials' undisclosed equitable interests in the stock of another corporation or secret partnership interests, although these are plainly covered by the statute. As a practical matter, it will never even know of ordinary shareholdings by its officials in companies with which it deals, unless the officials volunteer this information.

bade carrier officials from occupying certain enumerated positions in a firm dealing with the carrier, but left them free to have other equally serious conflicting interests in that firm. To close this gap the Senate bill required competitive bidding when any person serving as a director, "president, manager, or purchasing officer or agent" of a common carrier was also "an officer, director, manager, or agent of, *or* * * * *has any direct or indirect interest in,*" any firm with which the carrier had "dealings in securities, railroad supplies or other articles of commerce or contracts for construction or maintenance of any kind to the amount of more than $50,000 in any one year." (Emphasis added.) (S. Doc. 584, 63d Cong., 2d Sess., p. 13.) [14]

The conference bill adopted the general approach of the Senate bill. Without explanation, it changed the phrase "any direct or indirect interest in" to the present wording, "any substantial interest in" (S. Doc. 584, 63d Cong., 2d Sess., pp. 13–14; 51 Cong. Rec. 15791). But, the discussion of the phrase "any

[14] In presenting the conference bill to the Senate, Senator Chilton explained the essential difference between the Senate and House bills (51 Cong. Rec. 16002): "* * * instead of undertaking to regulate the matter of interlocking directors through the personnel of the board, it [the Senate bill] dealt directly with the evil, which was the objectionable transaction. It made it a criminal offense for certain officers of a common carrier to deal in securities or supplies, or make contracts with another corporation where there were interlocking directors and officers, unless the transaction was by competitive bidding * * *. [I]t makes it impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations. * * *"

substantial interest in" in the debate on the conference bill confirms the view that those words were intended to reach any situation where a director or official of a common carrier, although not serving in an official capacity in the other firm, had a relationship to that firm that would likely lead him to favor it to the detriment of the carrier. In short, the phrase was intended to reach the kind of divided loyalties that give rise to a "conflict of interest," *i.e.*, where someone is "interested in" the other party to the transaction.

Senator Chilton, one of the conferees, described the prohibition in its application to the sale of carrier securities, as covering "anyone who at the same time occupies a trust capacity or *is interested in* another corporation with which the dealings may be had" (51 Cong. Rec. 16003; emphasis added). He also pointed out (51 Cong. Rec. 16002) that Section 10 "makes it impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," and that its purpose was to enforce "honest, open methods * * * in purchasing and constructing by the common carriers. No honest management has anything to fear from this section, but it has a severe penalty that will deter the dishonest manipulator" (*id.* at 16003). He explained (*id.* at 15943):

> It not only prevents corporations which are interlocked by officers and directors, but it says: "Or who has any substantial interest in such of them."
>
> The Senator will recall all we had before us, the ease by which interlocking directorates

> could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board yourself.
>
> * * * * * * *
>
> * * * They can not dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the common carrier in the supply company, as the Senator chooses to call it, then it is prohibited.

(c) Our interpretation of the statute is confirmed by the contemporary understanding of the railroad industry itself. Congress did not make the requirements of Section 10 effective immediately,[15] and the Interstate Commerce Commission held hearings in 1916 on what regulations should be issued as to the form and procedures for competitive bidding. The first industry witness was Alfred P. Thom, General Counsel, Southern Railway Company, who was appearing "to look after the interests of the railroads and the association" (American Railway Association).[16] Mr. Thom sought, unsuccessfully, to have the Commission lay down rules as to how much stock would constitute a "substantial" interest and his testimony focused on stock interests.[17] But he had no doubt as to the principle involved in the statute, which

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[15] The statute was not to become effective until two years after its approval.

[16] *Administration of Section 10 of the Clayton Anti-Trust Act, Ex Parte* 54, pp. 4–5, 7 (June 20, 1916).

[17] We have filed with the clerk, and served upon opposing counsel, copies of Mr. Thom's testimony.

is precisely the issue before the Court. He said (pp. 13–14):

> The President of the United States, in January, 1914, brought to the attention of Congress what he conceived to be a wrong existing in the matter of dealings between common carriers and others, and he expressed the principle in this way:
>
> "The borrower and the lender, the purchaser and the seller, should not be the same person. The purchaser, if a common carrier, is managed by officers who occupy a fiduciary relation; they owe duties to their stockholders and to their creditors and to the public. They cannot act merely as individuals, prompted by their private gain, and acting in that fiduciary capacity, they should not be confronted by a situation of temptation, where, as individuals, they have an interest on the other side which will disturb and perhaps destroy the fairness of the performance of their fiduciary duty."
>
> Now Section 10 is the response of Congress to that recommendation of the President. It should be construed and it should be enforced for the purpose of carrying that into effect, * * *

(d) In view of the Congressional intention "to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers" and to make it "impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," Congress could not have

intended to require competitive bidding where the carrier's president is merely one of several directors of the firm with which it deals, but not to require such protection where he stands to share in the profits which the other firm receives as a result of its dealings with the carrier. The understanding which McGinnis and Glacy had with International was far more likely to influence them to favor International at the expense of the B & M than would be the case if one of them were merely a director of International but were not to receive any portion of its profits. In the latter situation, the statute would plainly apply; the result must, we submit, be the same in the present case where the danger of injury to the carrier is far greater.

CONCLUSION

For the foregoing reasons we submit that the judgment of the district court should be reversed and the case remanded for trial.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 232 of 1964.

UNITED STATES OF AMERICA,
Appellant,

v.

BOSTON AND MAINE RAILROAD ET ALS.,
Appellees.

BRIEF FOR THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON.

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BRIEF FOR THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON.

REFERENCE TO GOVERNMENT'S BRIEF.

The appellees for whom this brief is submitted are satisfied with the Government's statement of the case (on pp. 3 through 6 of its brief), except for the reference to count II,* with the Government's reference to the opinion below (p. 1),† its statement of the grounds upon which jurisdic-

*Count II is not part of the record before this Court. See the discussion at pages 25 through 27, *infra*.

† The opinion is also reported at 1964 Trade Cases, ¶ 70,999.

tion is invoked (pp. 1 and 2), and the setting forth of the statute involved, Section 10 of the Clayton Act (pp. 2 and 3.) Hence they make no further statement of the items called for by paragraphs (a), (b), (c), and (e) of Rule 40(1) of this Court.

QUESTION PRESENTED.

The question before the Court is whether or not (in the words of Section 10) a "substantial interest" in International corporation would exist upon an alleged "understanding, agreement, relationship, arrangement and concert of action" among two of the individual defendants and International (1) for "the purpose of producing profits for International" from dealings by it in property acquired from the Boston and Maine through the "intervention, direction or assistance" of the individual defendants (2) "pursuant to which" they "were to and did receive substantial monies" (Particulars, R. 24-25).

SUMMARY OF ARGUMENT.

1. Section 10 is a penal statute and as such should be strictly construed; the legislative intent must be gathered from the ordinary usage of the language employed (pp. 4-7).

2. An interest in a corporation or other business entity, construed according to common usage and judicial decision, means a proprietary interest; this has been uniformly held in construing similar phrases (pp. 7-11); the juxtaposition of the interlocking provisions likewise indicates, under *noscitur a sociis*, a position within the corporation (p. 11);

the statute differs from conflict of interest laws and regulations, which prohibit interests in "pecuniary profits," "contracts" or "transactions" (pp. 11-14).

3. The legislative history of Section 10 supports the same conclusion (pp. 14-22); it is not a conflict of interest statute, but is part of the Clayton anti-trust law, designed to supplement earlier anti-trust laws by making unlawful certain trade practices tending to monopoly; one of those trade practices was interlocking of directorates and officers and Section 10 was designed solely to meet that evil (pp. 14, 15); the original House bill prohibited interlocking between common carriers and corporations with which they dealt; the Senate rejected these prohibitory provisions, substituting the competitive bidding requirements where there were interlocks (pp. 15, 16); to prevent evasion of the interlocks the Senate made the law applicable where the carrier's directors or officers had "any direct or indirect interest" in the other company; when the bill went to conference this phrase was narrowed to " a substantial interest" (p. 16).

4. As the law imposes the primary punishment on the carriers, it should not be extended to make them liable for secret misconduct of their officers and directors which by its nature would be unknown to them (pp. 22-25).

5. The particulars do not allege such an interest; the "alleged" interest shows no control, continuity of relationship or determinate share in the corporation's profits; they distinguish between the "profits" for International and the "substantial monies" to be paid the individual defendants (pp. 25-27); the Government's argument erroneously describes the indictment as alleging defendants' sharing in the corporation's profits (pp. 25-26), and improperly assimilates the allegations of count II, which is not before the Court (pp. 27, 28).

ARGUMENT.

I. Section 10 of the Clayton Act is a Penal Statute and should be Strictly Construed.

Section 10 is a criminal statute. As such, it is to be strictly, not loosely, interpreted. If the concept of an "interest" in a "corporation" or other business is not generally understood to include a non-proprietary arrangement, it is presumed that, in passing a criminal statute containing such language as the test, Congress did not intend such inclusion.

The familiar rule in construing penal laws has been applied so frequently and for so long that it would be difficult to select a landmark case. As early as 1820 Chief Justice Marshall pointed out that—

> "The rule that penal laws are to be construed strictly, is, perhaps not much less old than construction itself."
>
> *United States* v. *Wiltberger*, 5 Wheat. 76, 95-96.

As the Court said in the *Wiltberger* case, the legislative intention in a criminal case must be gathered from the language employed, not from the language that might have been employed. If the language does not cover the act complained of, there is no justification for extending the statute.

As far as can be determined, the Court has never departed from a standard of strict, reasonable interpretation of criminal statutes. There are numerous cases where the Court has explicitly said that it would not do so. For example, *Smith* v. *United States*, 360 U.S. 1, 9; *United States* v. *Alpers*, 338 U.S. 680, 682; *United States* v. *Raynor*, 302 U.S. 540, 552; *United States* v. *Noveck*, 271 U.S. 201, 204;

and *United States* v. *Hartwell*, 6 Wall. 385. This standard of interpretation of course does not mean that the words of a criminal statute, where alternative interpretations are possible, are to be resolved into one which is implausible. It does contemplate, however, that such a statute is not to be read in a far-fetched interpretation merely because some result would follow which the prosecution or the tribunal believes desirable.

Later in this brief (at pp. 7-14) we show that the critical words "substantial interest in [a] corporation" do not include, as a matter of either general usage or legal usage, the kind of arrangement alleged in the particulars at R. 24-25. If we might assume that that kind of arrangement is one that *ought* to be prohibited in some law, the answer still is that it is not covered by Section 10's language.

The argument of the United States is in part that, if International had an uncompensated common director with the B&M, who stood to gain nothing, there would have been a violation, and that "the result must, we submit, be the same in the present case where the danger of injury to the carrier is far greater" (p. 25). The standard of interpretation which this Court, and judges in the United States generally, have followed is not consistent with such an approach.

The right view of a penal statute cannot be simply to take the most innocent act that it clearly punishes, and then to prosecute under the same law everything placed lower in the moral or social scale.

We think the present is not a mere *casus omissus* or an instance of inadvertence by Congress, as the legislative history discussed below will show (see pp. 14-22, *infra*). Yet, even if it were, there would nevertheless be a wrong result if the gap were to be filled in by afterthought.

Compare *United States* v. *Harris*, 177 U.S. 305, 309, where the word "company" as used in a criminal law was held not to include receivers of a company:

> "Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

An observation on the point is found in the opinion of Mr. Justice Brandeis in *United States* v. *Weitzel*, 246 U.S. 533, 543, at n. 2, collecting several instances of statutes which had been held not to cover activities which were within the same general classification and indeed policy as those covered and which Congress afterward voted to include. The opinion remarks:

> "The fact that in 1879 Congress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property

entrusted to them, but not owned by the United States, shows both how easily a *casus omissus* may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive." (*Ibid.*)

II. An "Interest" in a Corporation, within the Context of Section 10, Construed According to Common Usage and Judicial Decision, Refers to a Proprietary Interest and does Not Embrace Such a Relationship as That Described in the Bill of Particulars.

As appears later in this brief (pp. 14 through 16, below), the words of Section 10 have been selected with care. Hence the vital point of the case should be an examination of those words, and not of policies susceptible of accomplishment with a different statutory philosophy using other language.

By ordinary usage, "interest in a corporation," in contrast to words such as "interest in a contract," or "in a transaction," would not include the kind of relation here involved.

(i) *Cases Involving Phrases such as "Interest in a Corporation" or "Interest in a Business."*

There are indeed several areas of civil law where courts have had an opportunity to consider what is meant by such phrases as "interest in a corporation," "interest in a business," and "interest in property." In none of these cases have such words been construed as liberally as the Government would like to construe the present penal law.

Federal estate tax. In *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 316 U.S. 56, this Court construed Section 302(a) of the Revenue Act of 1926. The Act included in the "value of the gross estate" of a decedent the "value . . . of all property, real or personal, tangible or intangible, wherever situated— (a) To the extent of the interest therein of the decedent at the time of his death." The decedent in question died holding two unexercised powers of appointment. The Court held that he nevertheless had no "interest" in the appointive assets within the meaning of the taxing statute.

It likewise was held that even an exercised power of appointment did not bring appointive assets into the gross estate of a donee under Section 202(a) of the Revenue Act of 1916, applicable to property "To the extent of the interest therein of the decedent at the time of his death." *United States* v. *Field*, 255 U.S. 257. This was so although creditors of the donee of the power could have reached the assets under applicable Illinois law.*

Construction of wills. Again, suppose that a testator leaves "all my interest in X Corporation" to a certain individual. Would anyone suppose that the words included a debt or similar right or arrangement in favor of the testator?

The courts have uniformly held the contrary.

For example, in *Riverside Trust Co.* v. *Rogers*, 89 Conn. 690, 695-696, 96 Atl. 180, a will gave the testator's sister "all interest which I may have in said Rogers Paper Manufacturing Company and its shares." After asking whether

*The statutory law of taxation applicable to general powers is, of course, entirely changed at the present time. This is, however, the consequence of careful legislative revision, not the result of a strained interpretation of the concept of an interest in property.

the testator meant "to give to her the claims he had against the company for moneys loaned as evidenced by notes due, and for dividends and salary due," the Court ruled that the gift included *not one* of these items:

> "'An interest in a company' is not appropriate language with which to describe all obligations against the company which the testator might have. In this connection it means the right of property or share which the testator had in this company." (89 Conn. at 696.)

In *Major* v. *Major*, 106 Ind. App. 90, 96, 15 N.E. 2d 754, the Court reached a similar result, saying:

> "Generally speaking, an indebtedness due from a corporation to another, even though the person to whom the debt is owing be a stockholder of the corporation, does not, because of the debt, confer upon the person to whom it is payable an interest in the corporation. It is not so generally understood. A creditor's right is superior to that of a stockholder, but he has no right because of this relationship to any voice in the management or control of the corporation, or no interest therein within the meaning of that word in accordance with its ordinary usage."*

Attachment. In Massachusetts, and in some other states, local law permits attachment in equity of shares or interests in corporations. These statutes are interpreted

*To the same effect see *Johnson* v. *Goss*, 128 Mass. 433, 436-437; *In re Beard*, 57 Law Journal (N.S.) Ch. 887 (*held* that a debt due to the testator from a partnership business did not pass by a bequest of all his "share, right, and interest" in the partnership); *In re Earp's Will*, 1 Pars. Selected Cases (Pa.) 453 (same).

to exclude even remote or indirect ownership interests. In *Stone, Timlow & Co. Inc.* v. *Stryker*, 230 Mass. 67, 73, 119 N.E. 655, the Court interpreted such a statute authorizing the Superior Court in equity "to reach and apply shares or interests in corporations." Suit was brought to reach and apply stock in the defendant's possession but standing in the name of one Stone. The corporation's by-laws contained a stock-transfer restriction. Holding a demurrer properly sustained, the Court said:

> "The possibility that the court, in the bill now pending to compel Stone to effect a transfer of stock in the plaintiff corporation, may order specific performance of the agreement of Stone to transfer the stock to the defendant, is neither an ownership of shares nor an interest in the corporation within the meaning of the statute."

To the same effect see *Pennsylvania Co.* v. *United Railways of Havana*, 26 F. Supp. 379 (D. Me.), where the Court pointed out that "It is clear that the word 'interest' refers to a fractional ownership in the corporation and not to any equity of redemption" (at p. 384).*

The upshot of these cases is that the words upon which the Government rests its case are words which have been judicially interpreted to mean the precise opposite of the Government's construction. Only a proprietary right or share in the business is suggested by the actual language of

*Compare *Dexter* v. *Cotting*, 149 Mass. 92, 95, construing a probate bond law: "The words of the statute, 'all the persons beneficially interested in the trust,' mean all persons who have a present vested interest, and are not intended to include all persons who may possibly become interested in the future. When the Legislature deals with the rights of parties not in being, or not ascertained, who may have a contingent interest in a trust, or, for instance, in the case of a sale of the trust estate, it uniformly speaks of them as parties who 'may become interested.'"

Section 10. Accordingly Section 10 cannot be interpreted to mean more.

This sense of the phrase is also demonstrated by the context in which it appears in the statute. It is used disjunctively with words describing an interlocking of officers or directors; it is an "either/or" disqualification for certain intercorporate dealings. This would seem to suggest a position of control within the "other corporation." *Noscitur a sociis.* And we shall show later that the phrase was added for the very purpose of preventing evasion of the interlocking disqualification (*infra*, pp. 16, 18). In this context it is inapposite to a relationship whereby the railroad's officers, in effect, use, or act with, another corporation (but not from control within it) to effectuate transactions from which they may "receive monies."

(*ii*) *Distinguishable Statutes and Cases.*

The interpretation placed on Section 10 by the District Court is supported by the circumstance that other statutes deal with related problems in a contrasting manner.

The case at bar thus stands in marked contrast to those cited by the Government on pages 11 and 12 of its brief. Not one of those cases involved statutory or regulatory proscriptions dependent upon an interest in a business entity. On the contrary, they all were situations involving conflicts of loyalty arising in a particular transaction as distinguished from an interest in an entity.

For example, the case is unlike in this respect the situation before the Court in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520. The following indicates the principal differentiating features:

1. The statute in that case, 18 U.S.C. § 434, was a conflict-of-interest law, applicable solely to individuals

who act as officers or agents of the United States with conflicting interests. The statute here is an antitrust statute primarily applicable to railroad corporations and only secondarily to the officers or agents of such corporations.

2. The law in the *Mississippi Valley* case applied to federal officers or agents who were "directly or indirectly interested" in the private aspect. There was no requirement of substantiality. Section 10 in contrast applies only where the railroad officer or agent has a "substantial interest" in the other corporation, and an indirect interest presumably is not sufficient.

3. Section 434 covered any case where the federal officer or agent was interested "in the pecuniary profits or contracts of any [private] corporation." The Clayton Act requires that the officer or agent of the railroad have a substantial interest in "such other corporation" and not just in the profits or contracts of such other corporation.*

Again, in *Securities & Exchange Commission* v. *Dumaine*, 218 F. 2d 308, 314 (1st Cir.), the rule in question (S.E.C. Rule U-62) provided that no securities of a company in reorganization should be bought or sold by a committee member "in any transaction in which any such person has any beneficial interest, direct or indirect."

*The full statute reads as follows: "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

Section 20a of the Interstate Commerce Act, as added February 28, 1920, c. 91, § 439, 41 Stat. 494, 49 U.S.C. § 20a. Subsection (12) of Section 20a provides in material part:

> ". . . It shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account."

Section 20a is different from Section 10 of the Clayton Act in the following respects: (*a*) it appropriately is directed at the director or officer, not the carrier, and (*b*) it deals with the problem of the officer's or director's sharing in the proceeds, which is wider in application than Section 10, which prohibits only conflicting interests in the corporate entity.

The Interstate Commerce Commission has observed the difference in the two sections. Rejecting the argument that Section 20a in the field of carrier securities was a partial repeal of Section 10, the Commission placed emphasis upon—

> "the inclusion in the former section of paragraph (12) which has the same underlying theme as section 10 but goes a step further in forbidding an officer or director to share in any degree in profits from the hypothecation or sale of securities." *Columbia Terminals Co.*, 40 M.C.C. 288, 293 (1945).

What the Government asks is that the Court go the same "step further" with respect to carrier equipment and sup-

plies as Congress did with respect to securities in adopting Section 20a.*

Nothing in the statutory language nor in the legislative history discussed in part III below suggests that Section 10 was intended to deal with commercial bribery and kindred offenses. Other types of legislation can be and indeed have been devised to meet such evils. Note, "Control of nongovernmental corruption by criminal legislation," 108 U. of Pa. L. Rev. 848; and Comment, "Bribery in commercial relationships," 45 Harv. L. Rev. 1248. "If criminal statutes are to be relied on to prevent dishonest criminal practices, more extensive legislative action seems necessary" (45 Harv. L. Rev. at 1248).

III. The Legislative History of Section 10 as Part of the Clayton Anti-trust Act Supports the Same Construction.

The Clayton Act was enacted in response to President Wilson's Message of January 20, 1914, to the Congress (Senate Rep. 698, 63d Congress, p. 14), and was designed to supplement the Sherman Antitrust Act of July 2, 1890, and other antitrust Acts (*ibid.*, p. 1.) It was to make unlawful certain trade practices which might not be covered in the earlier statutes, and, by making them illegal, arrest the creation of trusts, conspiracies and monopolies in their incipiency (*ibid.*; p. 1; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 638, in dissenting opinion, citing *United States* v. *Sears, Roebuck & Co.* (D.C. N.Y.), 111 F. Supp. 614.)

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*Another statute involving carriers which should be noted is 18 U.S.C. § 660. The present indictment contains a second count based on Section 660. Among other things, that section prohibits officials of a carrier from abstraction or misapplication of its property or assets. (See Act of June 25, 1948, c. 645, 62 Stat. 730.)

One of these trade practices was interlocking directorates. President Wilson's Message asked for laws which "will effectually prohibit and prevent such interlockings of the personnel of the directorates of great corporations —banks and railroads, industrial, commercial, and public-service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business . . ." (*ibid.*, p. 14).

The original House bill, aimed at interlocking directorates (contained in Section 9), prohibited interlocking of directorates affecting three classes of corporations: common carriers, industrial corporations, and banking and trust corporations. With respect to common carriers, the bill forbade any interlocking of directors or other officers or employees of common-carrier corporations with any other corporation or common carrier which bought or sold or dealt in equipment, material or supplies with the carrier. It also forbade interlocking in banks and trust companies of over $2,500,000 and industrial corporations of over $1,000,000 capital (*ibid.*, p. 47).

The Senate bill retained the provisions relative to industrial corporations, struck out the provisions relative to banks and trust companies as being a subject more appropriate for legislation "in the domain of banking," and rejected the House provisions making illegal the interlocking among common carrier corporations and companies with which they dealt. The Senate Report recognized that emergencies might arise "when absolutely prohibitory law against such dealings would be most injurious to the public. In the case of railroads, calamities of fire and flood

might make it necessary in the shortest possible time and to a certain extent regardless of lesser consequences to replace engines, cars and bridges. The Committee have, therefore, recommended a substitute for the House paragraph on this subject, which, with the publicity, competitive bidding and the supervision of the Interstate Commerce Commission provided for, will, it is believed, minimize if not wholly cure the evil to be reached" (*ibid.*, p. 48).

Recognizing that these provisions might be evaded (see *infra*, p. 18), the Senate's redraft added to the provision against interlocking the words "or who has any direct or indirect interest in another corporation," etc. (*ibid.*, p. 64).*

When the bill came from conference, the phrase "any direct or indirect interest" was narrowed to what obviously was a more limited requirement, "a substantial interest."

Thus it appears that Section 10 (originally Section 9 in the House draft) as a component part of the antitrust laws was originally directed against the evil of interlocking directors or officers. The Act did *not* originate nor did it ever become a general conflict of interest law like that applicable to government officers and agents, considered in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (see *supra*, pp. 11, 12).

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*In Senate Report No. 698, under date of July 22, 1914, at page 47, what was then Section 9 of the bill was analyzed. "This is the section of the bill aimed at interlocking directorates in corporations. The purpose of the enactment is fully stated in the report of the Committee on the Judiciary at the House of Representatives . . . The first Senate amendment would substitute entirely new matter for the House provision in reference to directors of common carriers." The bill then stated (p. 12, line 7) that it would prohibit dealings between a carrier and another corporation in which an officer or director of the carrier was at the same time "an officer, director, manager, or general agent or [had] any direct or indirect interest."

It is obvious that the Clayton Act could not and did not cover all the problems that the investigation by the Interstate Commerce Commission on the collapse of the New Haven Railroad revealed.

The Government in its brief, on page 17, points out, apparently to demonstrate such an intent on the part of Congress relevant to the present case, that the New Haven "had purchased some $37,000,000 worth of cars from James W. Brady who had made substantial gifts to the officials with whom he dealt." Mr. Brady's contributions are described by the Commission as representing "gifts and obligations arising from friendship."

It was not stated by the Commission that these gifts and obligations of friendship were in fact bribes. The Commission observed, justly, that they would "tend to obscure official duty." *Financial Investigation of the New York, New Haven & Hartford Railroad Co.*, 31 I.C.C. 32, 61. At the same time, however, the report does not suggest that the Commission had in mind legislation to prevent such gifts.

On the contrary, the report is replete with narratives of abuses and mismanagement that contributed to the decline of the New Haven system. The various instances of misconduct described in the report could not all be brought under the antitrust laws, any more than the transaction involving Mr. Brady.

The Commission specifically dealt at pages 65-66 with the problem of interlocking directors, and at page 67 with conscious transgressions of the antimonopoly laws.*

*The problem of interlocking directors and stock ownership was to be a recurrent concern of the Commission. See *In re Relations Between Carriers by Rail and Carriers by Water*, 31 I.C.C. 1, 6, 22; *Mitchell Coal & Coke Co.*, 38 I.C.C. 40, 47; *In re Conditions Affecting the Production, Transportation and Marketing of Crude Petroleum*, 36 I.C.C. 429, 431-437; and *In re Rates for Transportation of Anthracite Coal*, 35 I.C.C. 220, 254, 298-302.

Recurring to the legislative history of Section 10, the concept of an "interest" which the carrier's director or officer "has" followed an objection, in a minority report by Representative Nelson, appearing in Report No. 627, Part 3, at pp. 8-9. Nelson pointed out that, while the language of the Committee's original draft might bar a common directorate, the "other corporation" could nevertheless be owned and controlled by the railroad's director or officer under the draft bill.

> "Dealings between two corporations in each of which the same men have a controlling interest are likely to result in the robbery of the minority stockholders. Such transactions should be prohibited, no matter how the interlocking control may have been secured . . . [Under the draft,] they may own all the stock of such other companies."

It is historically important to realize that the original bill in H.R. 15657 had outlawed *interlocking directorates* but not stock control. The original prohibition would have been easy to get around. The carrier's officer or director would not elect himself as the officer or director of the other corporation, but would elect his son, his agent or his lawyer. The only way in which this could be prevented was to modify the language in the natural and obvious way. The prohibition should apply, not only where there was actually a common officer or director, but also where the carrier's officer or director owned a sufficient interest to elect a relative or representative to an office or the board of the other entity.

As Senator Chilton, one of the sponsors of the bill in the Senate, put it on September 30, 1914, under the original bill "you could have your son, your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board your-

self." 51 Cong. Rec. 15943. For this reason, ownership of a substantial interest was placed on precisely the same footing as a common officership or directorate.

In a chapter dealing at length with interlocking directorates, Mr. Brandeis had already specifically dealt with this problem. Other People's Money, 67-68. He had then stated that there were "four important questions" involved in "proposals for legislation on this subject." The fourth question, which he had apparently thought to go to the extreme limit for such legislation, had been:

> "4. Shall the principle be applied so as to prohibit transactions with another corporation in which one of its directors is interested merely as a stockholder?" (P. 68.)

The author, in the following chapter, had answered the questions, and, as to the possible prohibition on stock interest, answered in the affirmative.* The only question in his mind had been the relative size of the stock interest that ought to be prohibited—the Pujo Committee had recommended 10% as a limit, and Mr. Brandeis argued that even a lesser interest might have the effect sought to be eliminated (pp. 83-84).

Congress did not adopt an arithmetical test of the amount of ownership, but adopted the test of substantiality.†

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*"The prohibition against one corporation entering into transactions with another corporation in which one of its directors is also interested, should apply even if his interest in the second corporation is merely that of stockholder. A conflict of interests in a director may be just as serious where he is a stockholder only in the second corporation, as if he were also a director." (P. 82.)

†The Government argues that its interpretation of the statute "is confirmed by the contemporary understanding of the railroad industry itself," basing its argument solely on an argument of Mr. Thom, General Counsel of Southern Railway Company (Gov't Brief, p. 23). We submit that Mr. Thom's testimony, if it may be taken as the "understanding of the industry," indicates that "sub-

The chronology, then, shows an original wide pattern of misconduct in railroad industry, investigated by the Interstate Commerce Commission, in the summer of 1914; then a rather narrow railroad prohibition, applicable to certain kinds of activity that were conceptually within the antitrust philosophy, and in the legislative process a continuing refinement and narrowing of the ultimately enacted product. The result is a bill which, as an antitrust law, covers interlocking directors and officers in the absence of public bidding and also interlocking control by a director or officer of the carrier by way of a "substantial interest" in the supplying or purchasing corporation.

The only case which we have found interpreting the relevant words of Section 10 supports our view. In *Beegle* v. *Thomson*, 138 F. 2d 875 (7th Cir. 1943), it was charged in

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stantial interest" related to a stock interest only, as to which he asked the Commission to declare what percentage constituted a "substantial interest." Mr. Thom's great concern, which underlay his argument, was that the Act should not apply to dealings between a parent corporation and its subsidiaries (pp. 14, 15), or to transactions between corporations, the common ownership of which is not forbidden by Section 7 (p. 18).

He posed the question finally in these terms (at pp. 41, 42):

"Now, can the Commission say that a percentage, no matter how small, of the capital stock of the selling company, or the company with which the dealing is, will not be considered a 'substantial interest', whereas anything above that percentage may or may not be a 'substantial interest' in accordance with the different nature of the different cases. If that could be said, if the Commission will find a percentage, no matter how small, of the capital stock of the company with which the transaction is, which the purchasing agent can lay down by the side of his transaction, and determine whether or not it comes within the requirements of this law, an assistant will be given to the practical performance of the duty of these people, which is incalculable, and I ask the Commission to consider that, to consider the adoption of a percentage, at which, and under which, there shall not be considered that the officer has a 'substantial interest' above which he may have or he may not have, in accordance with the nature of the case."

a civil antitrust action that the defendant, by using its large volume of freight haul as a club to coerce purchases of anti-splitting irons from itself, had compelled the Pennsylvania Railroad to purchase irons exclusively from the defendant. It was held that no violation of Section 10 was shown. "The statute creates no liability unless such an interlocking director or agency relationship exists." 138 F. 2d, at 880.

No one ever thought that this law was perfect, and it has been the subject of continuing criticism by the Commission and the Congress. See Fulda, Competition in the Regulated Industries: Transportation, § 4.14. It is there stated that "the Commission repeatedly indicated that section 10 of the Clayton Act was not sufficient to cope with the problem." The provisions of the Transportation Act of 1920, to Section 20a(12) of which we have referred in another section of this brief, were adopted in the light of this criticism (see p. 13, *supra*). Section 5.4 of the Transportation Act is another step in the same direction, prohibiting transactions to effectuate common control of two or more carriers except as provided in Section 5(2), and mentions "use of common directors" as one of the methods by which such unlawful control may be accomplished.

It may be noted that Section 9 of the original Clayton Act was indeed somewhat a departure from the usual antitrust philosophy. It prohibited embezzlement and misapplication of funds, credits or assets of a carrier by management, in language that would appropriately be found in a common larceny statute. We believe that Congress recognized that this was not an antitrust law in any usual sense, and, by the Criminal Code of 1948, Section 9 of the Clayton Act was repealed, and language substantially duplicating the original Section 9 now appears, in a more appropriate context, in Section 660 of Title 18.

The statutory context of Section 10 is significant. It is still a part of the antitrust laws. Section 1 of the Clayton Act so provides. 15 U.S.C. §12.

This Court has indeed observed that Section 10 "is, of course, an antitrust law," in *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U.S. 173, 190.

The result is that Section 10 is part of a group of statutes designed for specific purposes, and these purposes largely relate to aggregations of control and economic power. Section 10 is not a general panacea for all kinds of misconduct by railroad officials.

IV. The Section should Not be Interpreted to Subject the Innocent Carrier to Criminal Punishment for Secret Misconduct of its Directors and Officers.

One of the extraordinary results of the Government's interpretation of Section 10 is the effect upon the concededly innocent B&M. The B&M is not alleged to have been in any way remiss. It is not claimed that it let itself, deliberately, carelessly, or otherwise, fall into a situation involving common directors or deal with a company controlled by one of its officers or directors.

It is not to be presumed that Congress intended Section 10 to penalize carriers who were not only morally innocent (compare *Lambert* v. *California*, 355 U.S. 225, 227-228), but who also had no means of discovering the facts.

If Section 10 could be so interpreted, to punish the victims of a crime, we believe it would go beyond any criminal sanction yet approved by a Court.

Intent as an ingredient of crime was in this country "congenial to an intense individualism and took deep and early root in American soil" (Mr. Justice Jackson in *Morissette* v. *United States*, 342 U.S. 246, 251-252). Our

history has called for some regulations, however, as in the areas of food and drugs, by which even intent might be dispensed with, where the dangers inherent in negligence in such areas amid an urban industrial society would be intolerable. These regulations are nevertheless the exception, not the rule. The terrible risk to the public welfare, whether from adulterated food or from narcotics (compare *United States* v. *Balint*, 258 U.S. 250), justifies the elimination of a requirement otherwise indispensable to justice.

The other side of the story in "public welfare" statutes is that at least there must be some degree of opportunity for notice of facts that would set the innocent upon inquiry. Holmes, The Common Law, 55:

> "All foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known. A fear of punishment for causing harm cannot work as a motive, unless the possibility of harm may be foreseen. So far, then, as criminal liability is founded upon wrong-doing in any sense, and so far as the threats and punishments of the law are intended to deter men from bringing about various harmful results they must be confined to cases where circumstances making the conduct dangerous were known."

The *Lambert* opinion is expressive of a view that a penal statute cannot properly be interpreted to include as offenses activities where there is no conceivable opportunity of notice.

The Court has noted, in *Wright* v. *Georgia*, 373 U.S. 284, 293, after citing the *Lambert* decision, that it was "well

established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process.'"* Section 10, as interpreted by the Government, would not give any notice at all. The carrier would be precisely the entity that *could* not find out the facts.

> "Engrained in our concept of due process is the requirement of notice. . . . These cases [cited by the Court in the *Lambert* opinion] involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and un-

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*Mueller, "On Common Law Mens Rea," 42 Minn. L. Rev. 1043, 1102: "Reasonable men may differ about the propriety of absolute liability in the area of conduct regulations where everybody concerned knows of legislative intervention. But in a case like *Lambert* v. *California* there could be little disagreement. The moral issue was clear: this conviction does not accord with notions of morals, whatever we may wish to call these notions, e.g., due process, fair play and substantial justice, etc. The issue of utility was equally clear: no good could come of punishing a defendant under those circumstances. To the contrary, general frustration and disrespect for the law might result if substantial criminality were to rest on substantial innocence."

Compare Sayre, "Public Welfare Offenses," 33 Col. L. Rev. 55, 55-56: "Criminality is and always will be based upon a requisite state of mind as one of its prime factors. Acts alone are frequently colorless; it is the state of mind which makes all the difference between innocence and criminality. . . . To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the commmunity as to nullify its own enforcement." And at 83: "In general, offenses not requiring *mens rea* are the minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor vehicle regulations, or of general police regulations passed for the safety, health, or well-being of the community and not in general involving moral delinquency."

aware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."

Mr. Justice Douglas in the *Lambert* case, 355 U.S. at 228.

V. The Bill of Particulars does Not Allege Such an Interest.

Let us now briefly examine the language of the particulars in the light of the foregoing discussion. Three elements are lacking which are generally part of an interest in a corporation or other business:

(1) Control (perhaps even more important in connection with Section 10 than other areas of law).
(2) Continuity of the relationship.
(3) Determinate share in property or profits of the entity.

The only benefit that the individuals had from the alleged relationship with International was that "pursuant to [the arrangement] McGinnis, Glacy, and Benson were to and did receive substantial monies" (R. 25).

That would not have given them any right or power to control International or to elect a director. They could not have had a voice in International's affairs by reason of an understanding that they would receive amounts of money in connection with its B&M dealings.

Not only is there no allegation of any power to control, lack of which is sufficient under the Section 10 language to defeat the indictment, but there is not even an allegation that the individuals would have a continuing or determinate share in International's profits.

Language throughout the Government's brief, referring to the understanding alleged in the particulars, appears to be based on a misreading of the indictment in this respect.

We have collected in the footnote the instances, with page references to the brief.*

*At page 7, to the effect that Section 10 was intended to prevent officers of a carrier from causing dealings "with another firm *in whose profits* the carrier's officials expect to *share*"; on the same page, to the effect that defendants McGinnis and Glacy were assisting defendant International "in exchange for a *part of the profits*"; on the same page, referring to "an arrangement under which a carrier's officers are to *share in another firm's profits*"; on page 8, referring to an "*interest in a purchaser's profits*"; on the same page, under A, stating that the indictment and the particulars charged that McGinnis and Glacy "had *substantial interests in International's profits*"; on the same page, to the effect that they "were to *share* in or *receive* part of the *profits*"; on page 9, in reference to count II (see page 28, *infra*), to the effect that that count spelled out the details and showed "that McGinnis and Glacy were to *share in the profits*"; on pages 9-10, referring to a "claim to a substantial *share* in International's *profits* . . . *comparable to the interest of a shareholder or partner* of that firm, and greater than the interest a carrier official would have in a company which paid him a cash bribe"; on page 10, a statement that "McGinnis and Glacy *shared in* and, indeed, depended *upon the profits* they and International together could make; on page 11, referring to the Section 10 language, "any substantial interest" in such other firm, as broad enough to cover "any practical or pecuniary *interest in the profits* of another firm"; on page 12, in an attempted distinction of a cash bribe, which the Government appears to concede would not suffice, stating that "a *claim to a part of the profits* a corporation realizes from resale of property acquired from the carrier is plainly a 'substantial interest' in the purchasing corporation, giving the carrier official a highly significant stake in its profits and welfare"; on pages 12-13, that a hypothetical official, presumably like Glacy and McGinnis, is like shareholders because "he expects to *share in the profits*" and has a "conflicting *interest in the profits* of the purchasing corporation"; on page 13, referring to the "individual appellees' *interest in International's gain* from any transaction with the carrier"; on page 13, to the effect that, the "greater the harm to the carrier," the "more certain and *greater the profits* to International of which they would receive a substantial part"; on page 14, comparing the particulars with a partnership, stating that McGinnis and Glacy would have had, in that form, with the same dealings, a "claim to

The absence of any alleged proration of profits indeed stands as a sufficient reason why there is no "interest." The indictment is drawn so as to distinguish quite clearly between (*a*) the "profits" which the arrangement was to generate for International and (*b*) the "substantial monies," not alleged to be tied to those "profits" either in amount or by way of condition, which "pursuant to" the arrangement were to be paid to the individuals.

Questions of honesty and dishonesty should be immaterial in establishing the existence or nonexistence of an "interest" in a "corporation." Compare Cahn, The Moral Decision, 293-294. In view of the tone of the Government's brief, however, we would be remiss if we did not point out that there is no specific allegation of bad faith or dishonesty in count I.

Much of the actual argument of the Government is indeed based on count II, perhaps for psychological reasons.*

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a *part of the profits*"; on the same page, to the effect that Section 10 "requires competitive bidding where the carrier officials have a *claim to part* of another corporation's *profits* from dealings in property"; on page 15, to the effect that Section 10, in referring to "substantial interest," includes "an *interest* in the purchaser's *profits* from dealings"; and, on page 25, stating that Congress could not have intended to prohibit interlocking directors "but not to require such protection where he [the carrier official] stands to *share in the profits* which the other firm receives as a result of its dealings with the carrier." (All emphasis is ours.)

*In footnote 2 on page 8 the brief says that International was almost a "shell" and made the purchase of the cars "with a post-dated check which it covered by the proceeds," with a page reference to count II, and that the resale of B&M equipment was a major part of its business, again referring to count II. In the text at that page, and on page 9, the argument is that the "allegations of Count II of the indictment, charging a different violation of the same transaction, *spell out the details of the transaction.*" (Our emphasis.) The whole argument, from page 9 through page 15, is predicated on count II, not upon count I. Count I and the particulars at R. 24-25 nowhere suggest that International was a shell or that the profit from the transaction in question was large.

The unsoundness of construing count I in the light of count II is demonstrated by a very cogent illustration. Within the month, the Government has secured two other indictments of the same individuals, and one of them sets up the same allegations of "substantial interest" as are contained in the particulars to count I, but in that case there is nothing equivalent to the present count II.

The language of count I does not incorporate anything in count II. Such an incorporation, if intended, would have been permitted by Rule 7(c) of the Rules of Criminal Procedure, providing in part: "Allegations made in one count may be incorporated by reference in another count." The fact that there was no incorporation of count II into count I (compare incorporation of paragraph 2 of count I into count II, R. 10, and of paragraph 3 of count I into count II, R. 11) presumably means that incorporation was not intended.*

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*For example in *United States* v. *Gordon*, 253 F. 2d 177 (7th Cir.), a four-count indictment was returned for possessing goods stolen in interstate commerce (counts 1 and 3) and for further transporting the goods (counts 2 and 4), and the defendant wa convicted on all four counts. After this Court reversed the conviction (344 U.S. 414), he was found guilty again on all four counts. On appeal he argued that counts 1 and 3 were subject to dismissal because they did not allege the value of the stolen goods. The proof at the trial was clear that the goods were worth more than $100, and counts 2 and 4, which involved exactly the same goods as counts 1 and 3 respectively and which actually incorporated those counts by reference, in fact alleged that the goods were worth more than $100. The Court nevertheless held that counts 1 and 3 were bad, stating (253 F. 2d at 180):

"The government argues 'that after reading the indictment in this case there could be no doubt in anyone's mind that the goods set forth in counts 1 and 3 were valued at more than $100.' Assuming such to be true, the argument is beside the issue. Each count must be judged on its own allegations, either those made directly or by reference."

The Court quoted the statement of Mr. Justice Holmes in *Dunn* v. *United States*, 284 U.S. 390, 393, mentioned above, that "Each

The Government's repeated reference to the substance of count II, in these circumstances, is on precisely the same footing as a reference to newspaper articles or other extraneous material would be in support of an indictment. Such items ought to be coldly disregarded.

All this we assume is well settled as a matter of law. *Joplin Mercantile Co.* v. *United States,* 236 U.S. 531, 536. *Dunn* v. *United States,* 284 U.S. 390, 393. In the *Dunn* opinion it is stated that "Each count in an indictment is regarded as if it was a separate indictment."

CONCLUSION.

It is respectfully submitted that the Court should affirm the judgment of the District Court.

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January, 1965.

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count in an indictment is regarded as if it was a separate indictment" (*ibid.*). See also *Walker* v. *United States,* 176 F. 2d 796, 798, where the defendant was indicted in four counts for illegal sales of narcotics: "Appellee contends that because appellant was charged (under the four counts) with making four distinct and separate sales, it can be easily inferred that he was a dealer and therefore required to register. This contention ignores the rule that each count in an indictment is regarded as if it were a separate indictment and must be sufficient in itself."

CITATIONS

CASES:

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No. 232

In the
Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA,
Appellant

v.

BOSTON AND MAINE RAILROAD,
PATRICK B. McGINNIS, GEORGE F. GLACY
and DANIEL A. BENSON,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEE BOSTON AND MAINE RAILROAD

STATUTE INVOLVED

Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. § 20, provides in relevant part:

"No common carrier engaged in commerce shall have any dealings in . . . articles of commerce . . . to the amount of more than $50,000 . . . with another corporation . . . when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer or agent in the particular transaction, any person . . . who has any substantial interest, in such other corporation, . . . [without competitive bidding].

. . .

. . .

"If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation . . . shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both . . . ."

THE GOVERNMENT'S PARTICULARS

In response to the motion of appellee B&M that the government particularize the "nature and extent" of the "substantial interest" which the defendant McGinnis and the B&M's selling agent were alleged to have in International (R. 14), the government declared:

"The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B&M through the intervention, direction or assistance of defendants McGinnis, Glacy and Benson, and pursuant to which defendants McGinnis, Glacy and Benson were to and did receive substantial monies." R. 24, 25.

QUESTION PRESENTED

The Particulars allege that officials of a railroad corporation entered into an agreement with another corporation, International, having the purpose of producing profits for International from dealings by it in property acquired from the railroad pursuant to which agreement the officials were to and did receive substantial sums. Did such alleged agreement give the officials an "interest" in International within the meaning of section 10 of the Clayton Act, notwithstanding that the agreement gave the officials no right

to share in International, and notwithstanding that, under such construction, criminal responsibility of the road would be predicated on acts of agents allegedly intended not to advance the interests of the railroad, but to victimize it?

SUMMARY OF ARGUMENT

The agreement particularized neither is itself, nor gives rise to, an "interest" in International on the part of the B&M officials. An "interest", in common usage, is a *right* to *share*. The agreement does not purport to confer any share in International on the officials. The government's statements to the contrary notwithstanding, no more does the agreement purport to confer a share of International's profits on the officials; though, if it did, this would not confer an "interest" in *International*. The agreement, moreover, is illegal, unenforceable and can confer no rights of any kind. Hence, no *right* to share can arise as a result of it, and, again, no "interest".

Words of art in a statute should customarily be given their accepted definitions. Criminal statutes should be strictly construed. These principles both require that the word "interest" in section 10 of the Clayton Act be given its conventional meaning as a right to share. To equate "interest" to general concern would cut future interpreters of the word off from familiar guidelines and concepts and would produce a rule difficult of practical application.

In the legislative history of section 10, the interest limitation was introduced after a complaint concerning the evils of stock ownership by a carrier official in a corporation with which the carrier had dealings. The interest limitation was thereafter explained as an antidote to the ability a carrier official might otherwise have to put his son, cousin or lawyer on the board of a corporation with which

the carrier was to deal, an ability which would stem from stock ownership. This history shows that Congress intended "interest" to have its conventional meaning, and that, in the case of corporations, it was thinking of a stock interest.

Upon the government's view of "interest", the railroad would be charged with criminal responsibility for acts of its agents undertaken, allegedly, not for the benefit of the road, but for the private gain of the agents. To predicate criminal liability on a corporation for acts so motivated, undoubtedly held secret from the corporate body, would be a departure from general principles of corporate, agency, and criminal law. No policy considerations suggest themselves for inflicting criminal penalties on a corporation because it has allegedly permitted itself to be victimized by faithless servants. Indeed, so arbitrary a result raises serious constitutional questions.

Consistent with the accepted meaning of "interest" in law, and the legislative history of section 10, and to avoid the anomalous, irrational result of adding public penalty to alleged private wrong, this Court should conclude, as did the district court, that the agreement of the Particulars does not set forth an "interest" in International.

ARGUMENT

I. SINCE THE AGREEMENT ALLEGED WAS NEITHER TO SHARE IN INTERNATIONAL, NOR ENFORCEABLE IF IT HAD BEEN TO SHARE, IT CONFERS NO RIGHT AND HENCE NO "INTEREST" IN INTERNATIONAL, EITHER IN THE CONVENTIONAL OR CLAYTON ACT SENSE OF THE WORD.

A. *An "interest" in common parlance is a right to share in something.*

Black defines the word "interest" as

"The most general term that can be employed to denote a property in lands or chattels . . . .

"More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or undivided right; a title to a share." Black's Law Dictionary (3d ed.), "interest".

Bouvier defines "interest", in contracts, as follows:

"The right of property which a man has in a thing." 2 Bouvier's Law Dictionary, "interest".

Webster's definition is similar:

"1a: The right, title, or legal share in something . . . ." Webster's Third New International Dictionary, "interest".

To meet these definitions, there must be some agreement, occurrence, or relationship which confers a *right* to *share*. The cases recognize these requirements. For example, in *Major* v. *Major*, 106 Ind. App. 90, 96, 15 N.E. 2d 754, 757 (1938), holding that a bequest of "whatever stock or interest I may own at the time of my death in the Major Brothers Packing Company" did not bequeath to the recipients of the bequest the indebtedness due the testator from said corporation, the court observed:

"Generally speaking, an indebtedness due from a corporation to another, even though the person to whom the debt is owing be a stockholder of the corporation, does not, because of the debt, confer upon the person to whom it is payable an interest in the corporation. It is not so generally understood. *A creditor's* right is superior to that of a stockholder, but he *has no right because of this relationship to any voice in the management or control*

of the corporation, or no interest therein within the meaning of that word in accordance with its *ordinary usage.*" (emphasis added)

And in *New York* v. *Stone*, 20 Wend. (N.Y.) 139, 140 (1838), ruling that owners of personal property in a building destroyed by order of the Mayor could not recover under a statute allowing damages to "any person interested in the building," the New York Court of Appeals observed:

> "The term *interest* . . . clearly imports some share in the building itself, and was intended, probably, if not to be regarded as synonymous with *estate*, to include any degree of interest or claim therein which might not, in technical language, fall within any of the subdivisions of estates.

Thus, for an "interest" in something to exist, there must be a sharing in such thing, enforceable under the law—a right to share.

B. *The "agreement" particularized is not an agreement to share or participate in International.*

The particulars do not tell us the terms of the alleged agreement, but they do declare its purpose and result, that:

> "of producing profits for International from dealings by it in property acquired from the B&M through the intervention . . . of defendants McGinnis, Glacy, and Benson . . ."

and

> "pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

These particulars in no way allege any agreement *to share in International.* This alone is fatal to the claim that they show an "interest" in International.

The government's brief implicitly recognizes that an "interest" imports a share. The government would have it that this element is present, saying that the particulars allege an agreement whereby the individual defendants would share in International's profits:

> "Pursuant to this arrangement for producing profits for International, McGinnis and Glacy were to receive substantial sums (R. 25), i.e. *they were to share in or receive part of the profits which the arrangement was intended to create for International.*"[1] (Government's brief, p. 8, emphasis added).

It is then argued that the claim of the individual defendants "to a substantial share in International's profits from dealings in property acquired from the carrier created a real interest in International, comparable to the interest of a shareholder . . . ." Government's brief, p. 9.

Even if an agreement to share in profits of International produced under the "agreement" in fact were alleged, this would not constitute an interest in *International* itself; it would amount at most, arguably, to an interest in the *profits* the agreement produced. But, this point aside, no such agreement is alleged; the particulars most emphatically do not allege that the individual defendants "were to share in or receive part of the profits." *The particulars simply do not say this.* They say only that pursuant to the agreement, the individual defendants "were to and did receive substantial monies". The "monies" are not geared in to the "profits" under the "agreement".

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[1] Similarly, the government declares in its question presented that under the agreement the individual defendants "were to and did receive a substantial share of the other firm's [International's] resulting profits." This is a new development since the government's jurisdictional statement where the question presented declared only that under the agreement the individual defendants "were to receive substantial monies from such firm." Jurisdictional Statement, p. 2.

The government seeks to buttress its position by resort to Count II of the Indictment (R. 10-13):

> "The allegations of Count II . . . show clearly that McGinnis and Glacy were to share in the profits which they had agreed to help International make." Government's brief, pp. 8, 9.

It is, however, an elementary principle of criminal pleading that allegations in one count of an indictment not incorporated by reference cannot be resorted to to save insufficient allegations in another count. See, *e.g.*, *Dunn* v. *United States*, 284 U.S. 390, 393 (1932) ("Each count in an indictment is regarded as if it was a separate indictment"); *Walker* v. *United States*, 176 F.2d 796, 798 (9th Cir. 1949) ("it [the challenged count] must stand or fall upon its own allegations without reference to other counts not expressly incorporated by reference"). But suppose we do look to Count II; we find at once that the government's statement is not borne out. Nowhere in Count II is it alleged that there was an agreement to share in International's profits. All that is alleged is that, with respect to the ten car transaction, the individual defendants received $71,500

> "derived almost entirely out of the proceeds from the resale by International of the said 10 coaches." (R. 12)

If the agreement was that the officials should receive a share of the profits, the officials' receipts would have come entirely, not almost entirely, from the proceeds of the resale. Apart from this, the allegation that in fact most of the money did, in this instance, come out of International's profits is not the equivalent of an allegation that there was an agreement to share in the profits from such transactions. And again, as pointed out earlier, even such an agreement would establish a share only in certain of International's profits, not in International itself.

C. *The agreement particularized was unenforceable; it therefore could confer no right and hence no "interest" in International.*

We agree with the government's stress of the fundamental principle of law which forbids self dealing by fiduciaries to the detriment of their principal. *Wardell* v. *Union Pacific R.R.*, 103 U. S. 651 (1880), cited by the government, p. 14, declares that

> "The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonable resisted. Directors of corporations . . . cannot as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits." 103 U. S. at 658.

Similar statements that corporate officers and directors are not permitted to use their positions of trust and confidence to further their private interests are found in many other judicial decisions. See, *e.g.*, *Guth* v. *Loft, Inc.*, 23 Del. Ch. 255, 5 A. 2d 503, 510 (1939); *Lazenby* v. *Henderson*, 241 Mass. 177, 180, 135 N.E. 302 (1922); Restatement, *Agency* 2d §§ 387-98; cf. *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939).

Such being the law, the agreement alleged in the particulars, if proved, would surely be enforceable in no court in the land. Its objective is illegal.

The agreement being unenforceable, it can confer no *right* in the individuals to share in International or any of its profits. Lacking this element of a *right*, there can be no "interest" in International in any conventional sense of the word. Referring back to the law dictionary definitions earlier quoted, *ante* p. 5, the element of a right is basic: "more particularly it means a *right* to have the advantage

accruing from anything" and it is "the *right* of property which a man has in a thing". See also *Ragsdale* v. *Mays*, 65 Tex. 255, 257 (1886) ("The natural and ordinary meaning of the term 'interest in lands' includes the entire right held in them.")

It may be that the difficulty of the agreement giving rise to no enforceable right accounts for the curious phraseology of the Particulars. The Particulars declare that "The substantial interest . . . consisted of an . . . agreement . . . for . . . the purpose of . . ." etc. Now an interest is not an agreement; an agreement is not an interest. The beneficiary of a trust, asked what interest he had in the trust, would normally never answer—the declaration of trust; he would simply say that he was entitled to income or principal of the trust, or, in short, that he was a beneficiary. The government's equation of an agreement and the rights which may or may not stem from the agreement neatly veils the difficulty that the illegality of the agreement renders it impotent and productive of no rights at all. It avoids the red flag that would be presented by the words: their interest was their right in International arising under an agreement . . . . But the difficulty that the agreement creates no rights is there, nevertheless. In affirming that the word "interest" means a "legal interest" and "does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan" (R. 31), the District Court properly adhered to the commonly understood meaning of the word, as a *right* to share.

D. *An extra-legal concern, no matter how significant to the person concerned, does not give rise, in law, to an "interest".*

The government argues that "it is difficult to conceive of a scheme better calculated to create in the carrier's officers a substantial conflicting interest in International's

profits from dealing with the carrier" and that "The interest in International resulting from being a salaried 'director, manager, or purchasing or selling officer' of that corporation would be far less immediate and substantial." Government's brief, p. 13.

The government in these passages assumes a meaning of interest equivalent to a general concern. Whether such a meaning should be adopted here is of course the question at issue. The disadvantages of giving "interest" that meaning are well stated by the Massachusetts Supreme Judicial Court in *Inhabitants of Northampton* v. *Smith*, 11 Metc. (52 Mass.) 390 (1846). Speaking to a question of judicial disqualification, the court there said:

> "It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action. It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent.
>
> "On examining this will of Oliver Smith, we cannot perceive that it vests any pecuniary interest, legal or beneficial, in the towns named, other than Northampton. . . ." 11 Metc. at 396.

The hazards of cutting loose from the traditional meaning of "interest" can be illustrated by reference to the bribe example put by the government in its brief. Pp. 11, 12. "It might be argued", the government concedes, "that

receipt of a cash bribe for favoring another firm in its dealings with a carrier does not create a sufficiently continuing interest in that other firm, for the other firm's success or failure in its dealing might remain a matter of relative indifference to the recipient of the bribe." This is a large concession, because, once it is recognized that the receipts of the individual defendants are not geared to International's profits, the case alleged at bar is seen to be not too far from the bribe case. Should there then be a difference in result if the proffered bribe is to be measured by the amount of profits the favored supplier realizes? Does the result change according to the prospects of further such bribes being forthcoming?

Once the judiciary breaks away from the legal meaning of "interest" it will face difficult questions of degree and it will have to answer them cut loose from the legal concepts and guidelines otherwise attending the word "interest".

E. *The word "interest" as used in the Clayton Act should be given its natural meaning.*

The government declares that "the language of section 10 of the Clayton Act was carefully chosen" Government's brief, p. 10. We see no reason to disagree. Further, we submit that Congress used the word "interest" with precision, conscious of its meaning in law, in statutes, to lawyers and judges, and that it expected the courts to observe that meaning. The teaching of this Court in *Morissette* v. *United States*, 342 U.S. 246, 263 (1951) could not be more apt:

> "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in

> which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

This admonition that terms of art are to be given their normal meaning is reinforced by the equally familiar principle that criminal statutes are to be strictly construed, which carries the same message. *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 96 (1820). We submit that whatever the legislative history or policy of section 10 of the Clayton Act, the judiciary could not properly adopt the construction of "interest" urged by the government, thereby forsaking the usual meaning of the word as a right to share.

II. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED THE WORD "INTEREST" IN THE CLAYTON ACT TO BE GIVEN ITS USUAL MEANING.

Far from suggesting that construction of "interest" should take a direction contrary to the normal meaning of the word, the legislative history of section 10 of the Clayton Act reveals two circumstances which show that Congress was thinking in conventional terms; that where interest in a corporation was involved, Congress had in mind stock ownership, legal or beneficial. First, the restriction in section 10 respecting an interest in another corporation with which a carrier might deal was inserted as a consequence of an objection that *stock* ownership in the other corporation would produce the same evil as an interlocking directorate. The initial House version of what was to become the Act (H. R. 15657, 63d Cong. 2d Sess. (1914))

prohibited only interlocking directorates. Representative Nelson had objected to so limited a restriction in his minority report to the bill, saying:

> "Dealings between two corporations in each of which the same men have a controlling interest are likely to result in the robbery of the minority stockholders. Such transactions should be prohibited, no matter how the interlocking control may have been secured . . . . [Under H. R. 15657] they may own all the *stock* of such other companies." (emphasis added) H. Rep. No. 627, 63d Cong., 2d Sess., Part 3, p. 89 (1914).

The Senate responded to this expression of concern over evils stemming from ownership by carrier officials of a *stock* interest in the corporation with which their carrier might deal. It reported out a bill requiring competitive bidding where the carrier's agent "has any direct or indirect interest in" the corporation or other entity with which the carrier had dealings. S. Doc. 584, 63d Cong., 2d Sess. 13 (1914). The conference version, and the bill as enacted, substituted for the words "direct or indirect", the single adjective "substantial", producing the expression: "any substantial interest". S. Doc. 584, pages 13-14; 51 Cong. Rec. 15791 (1914).

The second circumstance showing that, as regards corporations, Congress was thinking conventionally, of a stock interest, is the explanation which was given on the floor of the House by Senator Chilton for the conference report's acceptance of the "interest" restriction. The purpose of requiring competitive bidding where a carrier official had a substantial "interest" in the corporate supplier or purchaser, Senator Chilton said, was as follows:

> "It not only prevents corporations which are interlocked by officers and directors, but it says: 'Or who has any substantial interest in such of them.'

The Senator will recall all we had before us, the ease by which interlocking directorates could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board yourself.

• • • •

. . . They can not dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the common carrier in the supply company, as the Senator chooses to call it, then it is prohibited." 51 Cong. Rec. 15943 (1914).

The placement by a carrier official of his son, cousin, or lawyer on a supplier's board would customarily, if not necessarily, be accomplished by the official voting his stock in the supplier for such person and surely this is what both Senator Chilton and his listeners had in mind when the foregoing explanation was made.

The government relies in its brief, page 23, on "the contemporary understanding of the railroad industry itself" as shown by General Counsel of Southern Railway Company, Alfred P. Thom, in remarks to the Interstate Commerce Commission June 20, 1916 on the subject of regulations to be promulgated under section 10. Why Mr. Thom's observations should be given any weight at all is not explained, but for whatever they may be worth, his statements to the I.C.C., far from supporting the government's position in this case, show that he too assumed that a *stock* interest in corporate suppliers was referred to. Pointing out that the words "substantial interest" are undefined, Mr. Thom asked:

"Now, *can the Commission say that a percentage, no matter how small, of the capital stock of the selling company,* or the company with which the dealing is, *will not be considered a 'substantial interest'*, whereas anything

above that percentage may or may not be a 'substantial interest' in accordance with the different nature of the different cases. If that could be said, *if the Commission will find a percentage, no matter how small, of the capital stock* of the company with which the transaction is, which the purchasing agent can lay down by the side of his transaction, and determine whether or not it comes within the requirements of this law, *an assistant will be given* to the practical purpose of the duties of these people, which is incalculable . . . ." *Administration of Section 10 of the Clayton Anti-Trust Act*, Ex parte 54, p. 39 (I.C.C. hearing, June 20, 1916). (emphasis added)

Thus, in the legislative history, not only is there no suggestion that Congress intended an illicit "agreement . . . and concert of action" in a corporate supplier or purchaser to be encompassed by the word "interest", but there are these affirmative indications that, where corporations were concerned, a conventional stock interest was what Congress had in mind.

III. A STATUTORY CONSTRUCTION HOLDING A CORPORATION VICARIOUSLY RESPONSIBLE, CRIMINALLY, FOR A PRIVATE AGREEMENT OF ITS AGENTS OUTSIDE THE SCOPE OF THEIR EMPLOYMENT AND CALCULATED ONLY TO HARM IT, WOULD BE A DEPARTURE FROM ACCEPTED PRINCIPLES OF LAW.

A. *The knowledge of the individual defendants of the acts here alleged, would not be chargeable to this corporate carrier in a civil proceeding.*

There is no suggestion in the Indictment or Particulars that the alleged "arrangement and concert of action" for producing profits for International, pursuant to which the individual defendants were to and did receive substantial moneys, was known to Railroad officials other than the individual defendants. The government in its brief speaks of

"a secret arrangement such as that alleged". Page 20, n. 13. It can hardly be doubted that an "arrangement" such as is alleged would be kept secret, locked firmly in the breasts of the participants. Such being the case, the Road would not be chargeable with knowledge of the transaction under principles of civil responsibility. "A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purpose . . .". Restatement, *Agency* 2d § 282. With the Railroad not being chargeable *civilly* for secret acts of its agents for their own personal benefit such as are alleged, it would ordinarily follow *a fortiori* that the Road would not be *criminally* responsible.

B. *Under general principles of law, corporations are held criminally responsible only where the acts of the agent from which liability would stem are motivated by a purpose to benefit his corporation, not the case here.*

While the law has come a long way since Blackstone declared that "A corporation cannot commit treason, or felony, or other crime in its corporate capacity" (Blackstone, *Commentaries* c. 18, § 12), no judicial decision that we know of has yet extended the criminal law to the point where corporate liability is predicated on an act by a corporate agent *which is designed solely to advance the personal interests and fortunes of the agent at the expense of his corporation.*

The leading Supreme Court case in this field of the law is *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481 (1909), holding constitutional imposition of liability on corporations for violation of the Elkins (anti-rebate) Act by reason of any proscribed act, omission, or failure of a corporate agent, acting within the scope of his

employment. Throughout this opinion, the Court stresses that the justification for imposing criminal liability on the corporation is because its agent's forbidden act *was done for the benefit of the corporation.* The court noted at the outset that corporations were responsible in tort for acts of their agents within the scope of employment, declaring:

> "And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. *In such cases the liability is* not *imputed* because the principal actually participates in the malice or fraud, but *because the act is done for the benefit of the principal,* while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct. *Lothrop* v. *Adams,* 133 Massachusetts, 471." 212 U.S. at 493 (emphasis added)

The Massachusetts court had said in *Lothrop:*

> "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, *but, the act having been done for his benefit by his agent acting within the scope of his employment in his business* it is just that he should be held responsible for it in damages." 133 Mass. at 480, 481. (emphasis added)

Passing to imposition of criminal liability on corporations for acts of their agents, the Supreme Court went on to say in *New York Central:*

> "We see no valid objection in law, and every reason in public policy, why *the corporation which profits by the transaction,* and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making

and fixing rates of transportation and whose knowledge and purposes may well be attributed to the corporation for which the agents act." 212 U.S. at 495. (emphasis added)

While the recent case of *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958) involved a partnership, rather than a corporation, it is pertinent here because it follows *New York Central* in resting criminal liability (for a knowing and wilful violation of the Motor Carrier Act) on the fact that the acts of the agents on which liability was predicated were done for the ultimate benefit of the principal. Relying on *United States* v. *Adams Express Co.*, 229 U.S. 381 (1913), which had in turn relied on *New York Central*, this Court said:

"The business entity cannot be left free to break the law merely because its owners, stockholders in the *Adams* case, partners in the present one, do not personally participate in the infraction. *The treasury of the business may not with impunity obtain the fruits of violations* which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law." 358 U.S. at 126. (emphasis added)

Truck drivers employed by the A & P partnership there transported dangerous articles in commerce without the examinations, certificates, markings, equipment, etc., required by I.C.C. regulations. These acts led to payments to the partnership from shippers for the articles thus transported and at the same time spared the partnership the time, trouble, and expense of compliance with the rules. Imposition of criminal responsibility on the carrier was justified as a reasonable offset to the prospective benefit a carrier might derive from encouraging its agents in illegal activity or winking at their violations.

Judicial decisions throughout the land which have sought to express the reason for imposing corporate res-

ponsibility for an agent's act in the particular situation presented have agreed that the reason is because the act was an effort to advance the corporate interest.

The Fifth Circuit in *United States* v. *Carter*, 311 F.2d 934 (6th Cir. 1963) held a corporation guilty of violation of the Taft-Hartley Act where its president had bribed a union representative, rejecting the argument of the corporation that it was not responsible for its president's criminal act. The Court agreed that:

> "It is essential . . . to corporate guilt, that its officer's or agent's illegal conduct be related to and be within the course of his employment *and have some connection with the furtherance of the business of such corporation.*" 311 F.2d at 942. (emphasis added)

But it concluded:

> "We think that it can be fairly inferred that in acceding to Felice's request for money and provide such money out of the corporation's funds, Carter, however illegal and misguided his actions were, did so in the course of his employment with, *and in furtherance of the business interest of, his company.*" Ibid. (emphasis added)

Holding a public utility corporation for violation of federal law in the making of campaign contributions, the Eighth Circuit declared that:

> "The test of corporate responsibility for the acts of its officers and agents, whether such acts be criminal or tortious, is whether the agent or officer in doing the thing complained of was engaged in 'employing the corporate powers actually authorized', *for the benefit of the corporation* 'while acting within the scope of his employment in the business of the principal'. If the act was so done it will be imputed to the corporation . . . . There is no longer any distinction in essence between the civil and criminal liability of corporations . . .". *Egan* v. *United States*, 137 F. 2d 369, 379, *certiorari denied*, 320 U.S. 788 (1943). (emphasis added)

The test in *Egan* was approved and applied in *United States* v. *Thomas*, 52 F.Supp. 571 (E.D.Wash. 1943).

Rejecting the contention that a corporation should not be held criminally responsible for the acts of subordinate agents,[2] the Second Circuit in the leading case of *United States* v. *George F. Fish Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) stressed the importance of the agents' motivation:

> "... to deny responsibility for the acts of minor employees is to immunize the offender *who really benefits*, and open wide the door for evasion." (emphasis added).

In *Steere Tank Lines Inc.* v. *United States*, 330 F.2d 719 (5th Cir. 1963) a corporate motor carrier was charged under the Motor Carrier Act with making false entries in drivers' logs. While the crime was that of knowingly and wilfully violating Commission rules, the statute was said to be in the malum prohibitum class. 330 F.2d at 723. It had been established that the false entries were made by truck drivers employed by the corporate carrier and the district court had charged:

> "Knowledge affecting the corporation, which has been gained by any officer, agent or employees thereof in the course of his work for the company is attributed to the corporation, and this includes subordinate employees, such as truck drivers." 330 F.2d at 723, n. 3.

The court found this charge to be error:

> ... knowledge sufficient to serve as a basis for a finding of a violation knowingly and wilfully done would depend on knowledge on the part of agents and employees of the corporation other than the truck drivers doing the falsifying. This necessarily follows from our holding in Standard Oil of Texas, supra, *for if the falsifications*

[2] There is a line of cases, which may perhaps be regarded as extreme, holding that violation by an agent of express instructions affords a defense to the corporation. See, *e.g.*, *Holland Furnace Co.* v. *United States*, 158 F.2d 2 (6th Cir. 1946); *John Gund Brewing Co.* v. *United States*, 204 Fed. 17, 23 (8th Cir. 1913).

> *were for the benefit of the truck drivers only, and unknown to any other agent or employee of the corporation, they could not rise to the level of proscribed violations.*" 330 F.2d at 723. (emphasis added)

The truck drivers would have been motivated, in making the false entries, primarily or exclusively by self-interest. The proof, however, had shown that "the extra hours were necessary in order for appellant to handle the business on hand with the available equipment and manpower" and that the manager knew of the falsifications. 330 F.2d at 721, 724. In the light of these facts, the court found that the error was harmless.

In *United States* v. *St. Louis Dairy Co.*, 79 F.Supp. 12, 19 (E.D. Mo. 1948), the Court instructed the jury

> "... that a corporation is bound by and legally responsible in a criminal case for acts performed or things done by an officer, agent, or employee of the corporation *when such officer*, agent or employee *is acting within the scope of his authority and the acts of such officer*, agent or employee *are performed for the corporation employing him* and are the duties delegated to him". (emphasis added)

See also *United States* v. *Brunett*, 53 F.2d 219, 236 (W.D. Mo. 1931) (corporate defendant criminally responsible for its manager's acts "acting for and on behalf of" the corporate defendant).

In *People* v. *Raphael*, 72 N.Y.S. 2d 748 (1947) the superintendent of an apartment house owned by the corporate defendant took an illegal bonus as a condition precedent to the renting of an apartment, resulting in prosecution of the employer corporation for violation of the rent control laws. While certain unsupported dicta in the case that a corporation is liable if "its officers participated in the crime" clearly go too far, the court held that the corporation should be acquitted, stressing the absence of any motive to benefit the corporation. Distinguishing *C.I.T.*

Corporation v. *United States*,[3] 150 F.2d 85 (9th Cir. 1945), where C.I.T.'s local manager, Wilkens, had made false statements in applications for FHA insurance on loans made by the corporation, the New York court pointed out:

> ". . . Wilkens did not make any personal profit or did not obtain a personal benefit out of the criminal transactions. *The benefits or profits of these transactions accrued to the corporation.* It is evident that the facts of the C.I.T. case are distinguishable from the case at bar. *There is no proof in the instant case that the benefits or profits of the criminal act accrued to the corporation.*" 72 N.Y.S. 2d at 752. (emphasis added)

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[3] This case, along with *Old Monastery Co.* v. *United States*, 147 F.2d 905, 908 (4th Cir. 1945) ("We do not accept benefit as a touchstone of criminal liability; benefit, at best, is an evidential, not an operative fact.") and *United States* v. *Steiner Plastics Mfg. Co.*, 231 F.2d 149, 153 (2d Cir. 1956) is sometimes cited for the proposition that if the agent is simply performing his corporate function, his corporation may be held criminally responsible for his acts. Though some of the observations in these cases appear to us to go too far, they are understandable in their settings. In all of these cases, the agents' acts were unquestionably motivated by a desire to further the corporate interests.

In *C.I.T.*, a conspiracy to falsify credit statement-applications for the purpose of getting FHA insurance was alleged. Wilkens, the defendant's local manager, was shown to be involved. Clearly, he had no personal interest to advance by participating in the scheme. His corporation was to get the insurance and make the money. Wilkens must have acted with this purpose in mind.

In *Old Monastery*, a corporation was charged with conspiracy to violate the Emergency Price Control Act. The proof was that its president caused sales of whiskey to be made by the corporation at above-ceiling prices and that he caused the corporation to give a check for $1,800 as a "commission" to the buyer. Again, it was the corporation, necessarily, that benefited from the sales, receiving an illegally high price for the whiskey. The buyer received the bribe, not the corporation's president. Therefore, in this case too, the agent's act was necessarily in furtherance of the interests of the corporation.

In *Steiner*, a corporation was charged with a criminal scheme to evade inspection requirements for airplane cockpit canopies manufactured for the government. Rejecting the argument that no

In another New York case, *Standard Food Products Corp.* v. *O'Connell*, 296 N.Y. 52, 69 N. E. 2d 559(1946), the Court of Appeals reversed a suspension of the license of a corporate liquor dealer, where its agent had fraudently diverted whiskey allotments to unlicensed retailers. The corporation was charged with violation of a state law that "no wholesaler shall sell . . . any alcoholic beverages . . . to any person who is not duly licensed." The statute defined "sale" as "any transfer . . . in any manner or by any means." The court observed that "when acts not mala in se are to result in loss or impairment of life, liberty or property the applicable statute should be narrowly construed." 69 N.E. 2d at 561. It then held:

> "Both the petitioner-appellant and the purported purchaser were the victims of a fraudulent scheme engineered by a dishonest employee, and there is no factual support for the conclusions that the petitioner-appellant either sold or agreed to sell or deliver liquor to any unlicensed person for the purpose of resale, as defined by the statute." 69 N.E. 2d at 561.

These many judicial decisions surely establish that a motive to benefit the corporation is essential to predicate corporate liability on its agent's act. By contrast, the arrangement in question, and the acts of the individual defendants, are in no way calculated to advance the in-

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officers of the corporation were shown to be involved, the court, following *Fish, supra*, p. 21, said "It was enough that agents of the corporation acting within the area entrusted to them had violated the law." 231 F.2d at 153. Here, too, the corporation, and only the corporation, benefited from the scheme, and its agents, in carrying it out, could only have been seeking to advance the corporate interests.

Supporting these conclusions is *Standard Oil Company of Texas* v. *United States*, 307 F.2d 120, 129 n. 19 (1962) discussing *Steiner* and other like cases, and concluding that "In each of them the corporate agent, whether a mere employee or, as in most cases, a high-ranking executive, intended that the corporation benefit through the production of business furthered by the action in controversy."

terests of the carrier. Since the government's proferred construction of the word "interest" would render the government's charge sufficient, notwithstanding the absence of this necessary element, it should be rejected.

C. *Not only would the alleged "arrangement" of the B&M's officials, which the government says gives them a forbidden "interest" in International, not benefit the B&M; it would affirmatively harm the B&M, making it all the more anomalous to hold the carrier criminally responsible for the existence of this type of "interest".*

The case at bar, and the prosecution of this carrier, is extraordinary and unique. The alleged acts of its agents upon which liability would be rested were, if the particulars are accepted as true, undertaken not only without a motive to benefit the carrier *but with an affirmative intent to harm the carrier.*

The government does not dispute the presence in this case, as pleaded, of this additional element of an alleged purpose to harm the carrier. It declares, however, that the statutory scheme inherently produces the "seemingly anomalous result" of subjecting a carrier "to penalties for acts of its officers or directors which were intended to victimize the carrier." Government's brief, p. 20. Elsewhere the government emphasizes that the acts of its agents for which the corporation is sought to be charged were calculated affirmatively to harm the corporation:

"... the statute ... is intended to prevent the officials of a carrier from causing it to deal *on unfavorable terms* with another firm in whose profits the carrier's officials expect to share. *This is precisely what the district court found was the nature of the scheme described in the indictment: 'an illegal and illicit plan to siphon off for* [*the individual appellees'*] *personal benefit property of the*

Boston and Maine Railroad through the medium of International.' " Government's brief, p. 7. (emphasis added)

And again:

"The instant arrangement to benefit from the profits of International's dealings in Boston and Maine property made the individual appellees' interest in International's gain from any transaction with the carrier directly dependent upon the extent of their departure from their fiduciary obligation: *the greater the harm to the carrier* from an inadequate sales price, the more certain and greater the profits to International of which they would receive a substantial part." Government's brief, p. 13. (emphasis added)

In searching the judicial decisions for an analogy to the case at bar, the one case that we have been able to find where a corporation was subjected to federal prosecution for unwittingly permitting itself to be victimized by its agents is *Standard Oil Company of Texas* v. *United States*, 307 F.2d 120 (5th Cir. 1962). The court held the corporations there involved not criminally responsible, and accordingly acquitted them: Two corporations had been charged criminally with violation of the Connally Hot Oil Act. Certain employees of these corporations had operated an illegal scheme for the benefit of a third party in consideration of cash bribes from the third party wherein they ascribed oil actually produced by one of the corporations to a third party. In the course of this scheme, the agents of the defendant corporations caused the corporations to transport contraband oil in interstate commerce. Whether criminal responsibility could be imposed "when all of such oil came into the custody of each corporation solely as a result of a deliberate purpose by unfaithful employees to cheat or steal is the legal question", the court said, "for our determination". 307 F.2d at 124, 125. The trial court had declared:

"The test, in deciding whether the conduct and knowledge of these employees should be imputed to the em-

ployer, does not turn on action consistent with or contrary to company policy, but instead the touchstone is the function of the employee.'' 307 F.2d at 128, n. 15.

This test, the Fifth Circuit found, was too broad. Relying on *New York Central* and *A & P Trucking*, it said:

> ''Of course the defendants do not contend, nor could they, that criminal accountability and actual benefit are equated. There have been many cases, and there may well be others in the future, in which the corporation is criminally liable even though no benefit has been received in fact. *But while benefit is not essential in terms of result, the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation.* For it is an elementary principle of agency that 'an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' Restatement of the Law of Agency (2d) § 235.'' 307 (F.2d at 128 (emphasis added)

It went on:

> ''It is for this reason that the simple 'function' test applied by the District Court—while obviously a factor of relevance—is alone insufficient upon which to rest convictions here. Thus the taking in or paying out of money by a bank teller, while certainly one of his regular functions, would hardly cast the corporation for criminal liability if in such 'handling' the faithless employee was pocketing the funds as an embezzler or handing them over to a confederate under some ruse.'' Ibid.

Applying these principles the court concluded that the corporations should not be held criminally responsible for ''the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer''. 307 F.2d at 129.

The crime in *Standard Oil*, to be sure, was a *knowing* transportation of the oil, a point stressed by the court. But

the court assumed that the knowledge required was "merely of the actions which constitute the crime" as distinguished from "a consciousness that the actions taken violate a known law". 307 F.2d at 126. And much of the language and reasoning of the court, particularly the example of the bank teller throws question on whether the result would have been different had the word "knowingly" been omitted.

D. *No public policy or other rational justification exists for a construction imposing criminal liability on a corporation on allegations such as are made here.*

In our brief in support of the railroad's motion to affirm the judgment below, we asked, at pages 3 and 4:

> "Is it reasonable, assuming proof of the charges, to penalize a Railroad, its stockholders and ultimately the public, because it has become the victim of an illegal scheme by its officials to divert Railroad assets to their personal benefit? . . . And if the 'arrangement' is undisclosed and secret as suggested and therefore not within the Railroad's control or power to forestall, what is to be gained by adding the penalty of criminal sanctions to the carrier's losses accruing from the scheme? If the statute is to be construed to penalize a carrier for allegedly allowing itself to be victimized by the illegal, secret conspiracies of its officials, does such a construction not raise serious constitutional problems?"

The answer given by the government is that "the statute plainly imposes an absolute liability on the carrier, although it is typically the unknowing victim of the harms proscribed by the statute." Government's brief, p. 20, n. 13. This answer merely assumes the result the government seeks; it suggests no *reason* why such a result is desirable. It does not answer our question as to whether it is *reason-*

able here to so construe the statute as to add criminal penalties to the carrier's woes.

Even if the special circumstances of this case were set to one side, we think it highly doubtful that corporate carriers, despite being "unknowing victims", should be held absolutely liable, criminally, for violation of section 10. As we have shown, this would be a radical departure from general principles of corporate and criminal law. The line of cases holding individuals and corporations liable for so-called malum prohibitum crimes are not precedents for such a result. The element of indifference of the corporate agents to the corporation's welfare, as alleged, distinguishes this from such cases. Unauthorized possession or distribution of contraband, narcotics or adulterated drugs, for example, may constitute criminal conduct and no one doubts that valid policy considerations underlie the federal statutes so providing. Applied to individuals, these statutes are not unreasonable, notwithstanding that an evil intent is not an element of the crime. Nor is their application to corporations, so long as the act of possession or distribution by the corporation's agents is undertaken for the corporation in the scope of employment. Individuals, by nature, are motivated by self-interest. Under the conditions stated, corporate agents are motivated to advance the interest of their corporation. These statutes appeal to such interest, offsetting by threat of punishment whatever gain the illegal act affords and thus serving to deter illegal conduct. But where the corporate agents knowing of the relevant acts are not motivated to benefit their corporation, it accomplishes nothing to appeal to their desire, which by definition is nonexistent, to avoid hurting the corporation. Whether the offense is malum prohibitum or mala in se, a statute imposing criminal liability on the corporation under such circumstances would be arbitrary, and not rationally defensible.

It is noteworthy that no prosecution under section 10 is revealed in the reported cases from the time of its enactment, 1914, until initiation of the instant case.[4] Perhaps other federal prosecutors have not been so sure that section 10 imposes absolute liability on carriers. Perhaps the court might find in an unusual case, a sufficient possibility of gain *to the carrier* from an interlocking relationship to justify imposing criminal liability for its existence. Perhaps the court would hold that *knowledge* of the occurrence of the act or relation is an implied element of crime, as it did in *Morissette* v. *United States, supra*, 342 U.S. 246. If such alternatives must be rejected, however, and "absolute liability" must be imposed on the "typically . . . unknowing victim of the harms proscribed," do we not then have a statute so arbitrary and irrational that a criminal fine imposed under it amounts to a deprivation of property without due process of law in violation of the fifth amendment?[5] Cf. *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963).

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[4] The only judicial decision we know of even to find section 10 applicable to the fact situation presented was In re *Missouri Pacific*, 13 F. Supp. 888 (E.D. Mo. 1935). The court there issued an order in the course of a reorganization proceeding requiring the Missouri Pacific's trustee to disaffirm a contract as in violation of the Clayton Act. The court observed, " . . . section 10 . . . has never been construed, so far as I know, for counsel have cited no cases construing it, nor have I found any . . . ." 13 F. Supp. at 892. Since that time, the only cases we have found discussing section 10 are likewise civil cases and all hold the section inapplicable: 1943—*Beegle* v. *Thomson*, 138 F.2d 875, 880 (7th Cir.) (patent infringement and treble damage suit: "interest" in securing the business of a large shipper not an "interest" under section 10); 1959—*Minneapolis & St. Louis Ry.* v. *United States*, 361 U.S. 173 (even if section 10 otherwise applicable, in view of section 5(11) of the Interstate Commerce Act, I.C.C. order permitting carrier acquisition of stock in another carrier legal) and *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F.Supp. 743 (N.D. Cal.) (treble damage suit — supplier with director on board of carrier not barred by section 10 from refusing to sell to competitor suppliers).

[5] We think it no longer doubtful, if it ever was, that the protection of the fifth amendment against deprivation of property

We do not perceive that any of the aspects of federal policy said to be behind the Clayton Act (Government's brief, pp. 10, 11) are advanced by imposing absolute liability on "unknowing" carrier victims. While criminal prosecution of the responsible individuals may be quite another thing, we do not see how the branding of the carrier as a criminal and imposition of a fine protects "the strength of the national transportation system", maintains "the integrity of the assets and accounts" or preserves "the system of free and fair competition among industries dealing with carriers." As pointed out, the honest officers, directors, agents, and stockholders of the carrier will already be fully motivated to forestall a dishonest scheme such as is particularized. The piling of injury by public penalty upon injury from private wrong would add nothing to their ability or desire to prevent a looting operation and would merely compound the damage to innocent stockholders of the carrier and the public it serves.

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without due process of law applies to corporations as well as individuals. This court recently permitted a corporation to take advantage of the double jeopardy provision of the same amendment in *Standard Coil Products Co.*, v. *United States*, 369 U.S. 141 (1962). We believe the assumption set forth in *County of San Mateo* v. *Southern Pacific R.R.*, 13 Fed. 145, 151 (D. Cal. 1882) holds true today:

> "The fifth amendment to the constitution contains a prohibition upon the government of the United States, similar to the one in the 14th amendment against the action of the states, declaring that no person shall be deprived of life, liberty, or property, without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against a confiscation equally with that of individuals."

The broad statements of inapplicability of the fifth amendment to corporations in *United States* v. *Guterma, et al*, 174 F. Supp. 581 (E.D. N.Y. 1959) and *United States* v. *Alabama Highway Express*, 46 F. Supp. 450 (N.D. Ala. 1942) should clearly be limited to the privileges against self-incrimination and unreasonable searches with which those cases were alone concerned.

These difficult problems which might be met in the case of an officer's undiscovered stock ownership in the supplier of a carrier are not, however, met in the case at bar *unless* the Court finds that the illegal agreement to produce profits in International alleged in the Particulars gave the individual defendants an "interest" in International. As we have shown, such a construction does violence to the accepted meaning of the word and is contraindicated by the legislative history. The reasons advanced by the government for embracing such a construction, however valid they may or may not be as applied to the individual defendants, all miss the mark when considered from the standpoint of the carrier. We submit that there is no reason in public policy for holding this corporate carrier criminally responsible for the "agreement" of its officials and International set forth in the Particulars to siphon off the carrier's assets to their own private gain.

CONCLUSION

The judgment of the District Court dismissing Count I of the Indictment should be affirmed, at least insofar as the defendant Boston and Maine Railroad is concerned, or in lieu thereof, the District Court should be directed to enter a judgment of acquittal[6] as to Boston and Maine Railroad.

Respectfully submitted,

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[6] With the filing of the Particulars, it becomes apparent that at trial the government's evidence would be insufficient to support a conviction, thus accelerating the time when entry of a judgment of acquittal was in order. See In re *United States*, 286 F.2d 556, 562, 566 (1st Cir. 1961) ("at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit"); *United States* v. *Maryland Co-operative Milk Producers*, 145 F. Supp. 151, 152 (D.C. 1956) (acquittal entering after filing of trial stipulation by government); *McGuire* v. *United States*, 152 F. 2d 577, 580 (8th Cir. 1945); *United States* v. *Dietrich*, 126 Fed. 676, 678 (C.C. Neb. 1904). The Railroad's motion to the District Court was for judgment of acquittal, or, alternatively, to dismiss (R. 29).

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 232

UNITED STATES OF AMERICA, APPELLANT,

v.

BOSTON AND MAINE RAILROAD, PATRICK B. MCGINNIS, GEORGE F. GLACY, AND DANIEL A. BENSON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE UNITED STATES

This brief is filed in response to the contention—made principally by appellee Boston and Maine (Br., pp. 16–32), but also by the individual appellees (Br., pp. 22–25)—that to interpret Section 10 of the Clayton Act so as to subject a corporation to criminal punishment for secret acts of its officers which operated to its detriment and which it could not prevent would contravene settled principles of criminal law.

Both the face of the statute and its legislative history leave no doubt that Congress recognized that carriers which failed to follow the statutory requirement of competitive bidding would be subject to

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criminal prosecution without regard to whether the interlocking relationship which gave rise to the violation was secret or open, or whether the actions of the corporate officials were intended to benefit or harm the carrier. Indeed, the legislative history shows that one of the principal evils which Section 10 was designed to reach was the looting of carriers accomplished through self-serving dealings with buyers and sellers with whom the carriers' officials or directors had interlocking relationship. See our main brief, pp. 15, 17–18, 22. Carrier officers who engage in such looting of their companies are not likely to publicize their misdeeds to their fellow officers or directors.

Appellees' argument proves too much, since it would make the statute inapplicable to cases which appellees apparently concede would be covered (see B & M Br., p. 32). Assume, for example, that what had occurred in the present case was that, unknown to the other officers or to the directors of B & M, the carrier's selling officer secretly also was the purchasing officer of International; and that, in return for a share of the profits which International would make on the deal, he sold the B & M cars to International at the same price at which the sale charged in the present case was made. In so doing, the official would not be serving the interests of the B & M but would be injuring them; yet the carrier would not be aware of the misfeasance. There could be no possible question, however, that when the transaction took place without competitive bidding, the carrier could be prosecuted under Section 10. Perhaps in such a case

the trial court would impose a light sentence or even suspend sentence, as it might well do in the present case if the appellees are convicted. But the fact remains that in such a situation the carrier would have violated Section 10 even though (1) it had been the victim rather than the beneficiary and (2) it had been powerless to prevent the looting.

To be sure, Congress did not articulate the reasons which led it to conclude that a carrier should be subject to criminal prosecution for violating the competitive bidding requirement without regard to whether such violation aided or injured it. Both the statute itself and its history leave no doubt that Congress intended that result. Since officials and directors of a carrier can be criminally liable under the statute only if the carrier itself committed a violation, the acceptance of appellees' interpretation of Section 10 would mean that such officials and directors would escape punishment thereunder even though, as alleged in the present case, they were guilty of the most shocking breaches of their fiduciary obligations to their companies.

There are, in fact, cogent reasons which justify the congressional decision to subject carriers to criminal liability for violating Section 10 even though, under traditional standards governing corporate criminal liability, their violations might not be deemed wilful or knowing (see below p. 5). The publicity that inevitably would accompany the conviction of a corporation for violating Section 10 itself would have the salutary effect of informing the public of what has taken

place, and it might encourage stockholders to rid the company of incompetent or dishonest management. Moreover, the imposition of criminal penalties on the corporation is appropriate in order to induce corporate officials to take action in situations where an interlocking relationship is the factor that influences the carrier to deal with particular buyers or sellers, but the absence of competitive bidding does not injure the carrier because it does just as well in dealing with those persons as it would in dealing with others.[1] In such a case an official of a carrier who knows or suspects that his colleagues are engaging in such favoritism may decide not to do anything about it because the corporation is not suffering. The threat that the corporation may be criminally prosecuted and fined for such violation thus may be the principal impetus to inducing such official to stop the practice.

Section 10 is a prophylactic statute designed to prevent dealings between carriers and buyers or sellers with whom it has interlocking relationships except pursuant to competitive bidding. In many situations it may be difficult, if not impossible, to ascertain whether there has been any actual over-reaching in such dealings. Section 10 thus embodies the basic concept upon which all conflict-of-interest statutes rest: that because of the possibility of evil, particular conduct is to be prohibited or regulated without re-

[1] In such a case an antitrust objective of Section 10 is nevertheless frustrated, for the substantial business of a railroad may be directed to a single source, to the exclusion and competitive injury of the latter's competitors.

gard to the actual impact of the particular transaction on the affected company.

Congress could have made it a crime for an officer of a carrier, who is not himself a party to dealings between a carrier and firms with whom it has interlocking relationships, negligently to fail to take necessary steps to stop them. Congress did not act unreasonably in selecting the less severe sanction of inducing corporate officials to take such action by subjecting the corporation to criminal prosecution if they fail to do so and limiting the individual's liability to cases where they acted "knowingly."

None of the numerous cases upon which the B & M relies to show that corporations are not subject to criminal prosecution on the basis of acts of their officials which injure them (Br., pp. 17–27) held that the legislature could not make a corporation criminally liable for acts done without knowledge or intent. Indeed, in *Standard Oil Co. of Texas* v. *United States*, 307 F. 2d 120 (C.A. 5), upon which B & M relies heavily (Br., p. 24)—the court recognized (p. 125) that "it is perfectly clear that Congress may in certain areas impose criminal liability on a corporation for the mere doing of the proscribed act wholly unrelated to knowledge, actual or constructive * * *." Congress did precisely that in Section 10 of the Clayton Act, and the imposition of such absolute criminal liability in this important regulatory statute was neither arbitary nor without reasonable basis. Cf. *United*

States v. *Balint*, 258 U.S. 250; *United States* v. *Dotterweich*, 320 U.S. 277.

Respectfully submitted.

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